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CLERK

No. 00-201

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Attorney for Petitioners

EMILY MARUJA BASS
Counsel of Record
GAYNOR & BASS
535 Fifth Avenue
23rd Floor
New York, New York 10017
(212) 953-4300

PATRICIA A. FELCH
Counsel of Record
BANNER & WITCOFF LTD
10 South Wacker Drive
Suite 3000
Chicago, Illinois 60601
(312) 715-1000

Attorneys for Respondents

164314

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

785pp

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JONATHAN TASINI; BARBARA BELEJACK; MARY KAY BLAKELY; BARBARA GARSON; DANIEL LAZARE; MARGOT MIFFLIN; JOAN OLECK; SONIA JAFFE ROBBINS; LINDSY VAN GELDER; DAVID S. WHITFORD

plaintiff

v.

THE NEW YORK TIMES CO.; NEWSDAY INC.; THE TIME INCORPORATED MAGAZINE COMPANY; MEAD DATA CENTRAL CORP.; UNIVERSITY MICROFILMS INTERNATIONAL

defendant

THE ATLANTIC MONTHLY COMPANY

Defendant

* * *

12/16/93 1 COMPLAINT filed; Issued Notice pursuant to 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT # 206205 (jl) [Entry date 12/21/93]

* * *

District Court Docket Entries — Selected

2/28/94	2	AMENDED COMPLAINT by Jonathan Tasini, Barbara Belejack, Mary Kay Blakely, Barbara Garson, Daniel Lazare, Margot Mifflin, Joan Oleck, Sonia Jaffe Robbins, Lindsy Van Gelder, (Answer due 3/13/94 for University Microfilm, for Mead Data Corp., for The Time Inc., for Newsday Inc., for The N.Y. Times) amending [1-1] complaint against The Atlantic Monthly; Summons issued. (cd) [Entry date 03/04/94]

* * *

5/6/94	7	ANSWER by The Atlantic Monthly, Mead Data Corp., University Microfilm (Attorney Robert G. Sugarman) to amended complaint; Firm of: Weil, Gotshal & Manges by attorney Robert G. Sugarman for defendant The Atlantic Monthly (ls) [Entry date 05/10/94]

* * *

5/6/94	12	ANSWER to Complaint by The N.Y. Times, Newsday Inc., The Time Inc., Mead Data Corp., University Microfilm (Attorney Bruce P. Keller); Firm of: Debevoise & Plimpton by attorney Bruce P. Keller for defendant University Microfilm (ls) [Entry date 05/10/94]

* * *

District Court Docket Entries — Selected

1/4/95	21	ORDER, for confidentiality (signed by Judge Sonia Sotomayor); Copies mailed (jr) [Entry date 01/07/95]

* * *

2/7/96	26	STIPULATION and ORDER, that the defts NY Times, Newsday, Time, University Microfilms & Lexis/Nexis have waived the right to make any changes to either the form or substance of the deposition transcripts of the listed individuals (see doc.); Purs to the Court's Order of 12/20/95, the depositions of Tasini, Whitford & Mifflin shall be taken & completed on 2/5/96, and it is further agreed that any materials responsive to the outstanding documents requested by defts be produced by pltffs by 1/31/96. (signed by Judge Sonia Sotomayor). (1am) [Entry date 02/08/96]

* * *

5/21/96	32	SEALED DOCUMENT placed in vault (sp)
5/21/96	33	SEALED DOCUMENT placed in vault (sp)
5/21/96	34	SEALED DOCUMENT placed in vault (sp)
5/21/96	35	SEALED DOCUMENT placed in vault (sp)
5/21/96	36	SEALED DOCUMENT placed in vault (sp)
5/21/96	37	SEALED DOCUMENT placed in vault (sp)

* * *

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5/21/96 39 MEMORANDUM OF LAW by The N.Y. Times, Newsday Inc., The Time Inc., Mead Data Corp., University Microfilm, The Atlantic Monthly in support of [38-1] cross motion for summary judgment (ae) [Entry date 05/23/96]

5/21/96 40 MEMORANDUM OF LAW by The N.Y. Times, Newsday Inc., The Time Inc., Mead Data Corp., University Microfilm, The Atlantic Monthly in further support of [38-1] cross motion for summary judgment and in opposition to plaintiffs' motion for summary judgment. (ae) [Entry date 05/23/96]

* * *

5/21/96 42 REPLY MEMORANDUM by The N.Y. Times, Newsday Inc., The Time Inc., Mead Data Corp., University Microfilm, The Atlantic Monthly in further support of re: [38-1] cross motion for summary judgment and in opposition to plaintiffs' motion for summary judgment. (ae) [Entry date 05/23/96]

5/21/96 43 MEMORANDUM OF LAW by Jonathan Tasini, Mary Kay Blakely, Barbara Garson,

Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford in support of their motion for summary judgment on the issue of liability. (ae) [Entry date 05/23/96]

5/21/96 44 REPLY MEMORANDUM by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, David S. Whitford, Sonia Jaffe Robbins IN FURTHER SUPPORT of their motion for summary judgment and IN OPPOSITION to re: [38-1] cross motion for summary judgment (ae) [Entry date 05/23/96]

5/21/96 45 MEMORANDUM OF LAW by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford in opposition to [38-1] cross motion for summary judgment (ae) [Entry date 05/23/96]

5/21/96 46 BRIEF RESPONSE by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford to re: The Amicus Curiae Brief submitted by The American Society of Media Photographers. (ae) [Entry date 05/23/96]

5/21/96 47 BRIEF of The American Society of Media Photographers as Amicus Curiae Supporting Plaintiffs. (ae) [Entry date 05/23/96]

District Court Docket Entries — Selected

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5/21/96	49	MEMORANDUM OF LAW by The N.Y. Times, Newsday Inc., The Time Inc., Mead Data Corp., University Microfilm, The Atlantic Monthly in response to re: [47-1] Brief, [46-1] Brief Response (ae) [Entry date 05/23/96]
11/7/96	50	Filed Memo Endorsement on letter dated 11/4/96 from Emily Bass requesting that the Court accept the defendants' proposal. Proposal accepted . . . So Ordered. (signed by Judge Sonia Sotomayor) (kw) [Entry date 11/08/96]
12/2/96	51	Transcript of record of proceedings filed for dates of 10/17/96 before Judge Sotomayor. (kw)
12/10/96	--	Memo to the Docket: Pre-trial conference held by Sotomayor. (kg) [Entry date 12/11/96]
12/31/96	52	Filed Memo Endorsement on letter from Emily Bass, Esq. dated 12/30/96, requesting permission to deposit w/the Clerk of the Court copies of the CD-ROMS that were used in the defts' December 10th demonstration and referred to in Mr. Keller's supplementary argument . . . GRANTED . . . SO

* * *

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2/5/97	54	Transcript of record of proceedings filed for dates of 12/10/96 at 3:10 p.m. before Judge Sotomayor. (kg) [Entry date 02/06/97]
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* * *

8/18/97	57	JUDGMENT, Ordered, adjudged and decreed, that for the reasons stated in the Court's Opinion (79095) and Order of 8/13/97, defendants' motion for summary judgment are hereby granted, and judgment is hereby entered dismissing the remaining defendants in accordance with the Court's Opinion and Order. JAMES M. PARKISON; Mailed copies and notice of right to appeal. EOD 8/19/97. (ae) [Entry date 08/19/97] [Edit date 08/22/97]
8/18/97	--	Case closed (ae) [Entry date 08/19/97]
9/4/97	58	NOTICE OF MOTION by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford for reargument of [57-1] judgment order (djc) [Entry date 09/09/97] [Edit date 09/09/97]

District Court Docket Entries — Selected

9/4/97 59 MEMORANDUM by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford in support of [58-1] motion for reargument of [57-1] judgment order (djc) [Entry date 09/09/97]

* * *

9/17/97 60 NOTICE OF APPEAL by Jonathan Tasini, Mary Kay Blakely, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford; from [57-1] judgment order, [55-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Bruce P. Keller. $105.00 Appeal filing fee paid on receipt # E 297214 on September 17, 1997. (dt) [Entry date 09/18/97]

9/19/97 62 MEMORANDUM by The N.Y. Times, Newsday Inc., The Time Inc. in opposition to [61-1] motion for reargument of the Order of this Court dated and filed on August 13, 1997, [58-1] motion for reargument of [57-1] judgment order (cd) [Entry date 09/23/97]

* * *

9/26/97 64 REPLY MEMORANDUM by Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, David S. Whitford re: [61-1] motion for reargument of the Order of this Court dated and filed on August 13, 1997 (cd) [Entry date 09/30/97]

District Court Docket Entries — Selected

10/31/97 65 MEMORANDUM OPINION #79543 denying [61-1] corrected motion for reargument of the Order of this Court dated and filed on August 13, 1997, denying [58-1] motion for reargument of [57-1] judgment order (Signed by Judge Sonia Sotomayor); Copies mailed. (cd) [Entry date 11/03/97]

* * *

11/25/97 67 Appeal reinstated by Barbara Garson, Sonia Jaffe Robbins [60-1] appeal by David S. Whitford, Sonia Jaffe Robbins, Margot Mifflin, Mary Kay Blakely, Jonathan Tasini USCA NUMBER: 97-9181. George Lange, III, Clerk, USCA. (as) [Entry date 11/26/97]

12/1/97 68 NOTICE OF APPEAL by Barbara Garson, Sonia Jaffe Robbins; from [65-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: Bruce P. Keller, Esq. and Prof. William Patry. $105.00 Appeal filing fee paid on December 1, 1997 on receipt # 302791. (dt)

* * * *

SECOND CIRCUIT DOCKET ENTRIES — SELECTED

GENERL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 97-9181 Filed: 9/23/97
Nsuit: 3820 PROPERTY RIGHTS-Copyright
Tasini, et al v. The New York Times, et al
Appeal from: U.S. District Court SDNY

Case type information:
1) Civil
2) Private
3) none

Lower court information:

District: 0208-01:93-cv-8678
Magistrate Judge: Theodore H. Katz
Trial Judge: Sonia Sotomayor
Date Filed: 12/16/93
Date order/judgment: 8/18/97
Date NOA filed: 9/17/97

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	97-9181	97-9650	2/3/98	

Second Circuit Docket Entries — Selected

Panel Assignment:
Panel: RKW RJM RSP 1705 :CA2 4/26/99 am
Date of decision: 9/24/99

* * *

2/2/98 Appellants David S. Whitford, Margot Mifflin, Mary Kay Blakely, and Jonathan Tasini brief FILED with proof of service. [24] (cv75) [97-9181]

* * *

2/3/98 Appellants Sonia Jaffe Robbins in 97-9181, and Barbara Garson in 97-9181 brief FILED with proof of service. (cv75) [97-9181]

* * *

3/17/98 Appellees University Microfilm in 97-9181, Mead Data Central Co. in 97-9181, The Time Inc. in 97-9181, Newsday, Inc. in 97-9181, and The New York Times in 97-9181 brief filed with proof of service. (cv75) [97-9181]

* * *

3/17/98 Amicus Curiae Advance Publications in 97-9181, The Copley Press, In in 97-9181, Cox Newspapers, Inc in 97-9181, Cox Interactive Medi in 97-9181, Dow Jones & Co., Inc in 97-9181, The E.W. Scripps in 97-9181, Hachette-Filipacchi in 97-9181, The Hearst Corporati in 97-9181, Knight

Ridder in 97-9181, Meredith Corporation in 97-9181, National Geographic in 97-9181, News America Incorpo in 97-9181, Newspaper Associatio in 97-9181, Philadelphia in 97-9181, Playboy Enterprises, in 97-9181, Rodal Press, Inc. in 97-9181, Times Mirror Magazin in 97-9181, Tribune Company in 97-9181, The Washington Post in 97-9181, Ziff-Davis Inc. in 97-9181 brief filed with proof of service. (cv75) [97-9181]

* * *

4/7/98 Appellants David S. Whitford in 97-9181, Margot Mifflin in 97-9181, Kay Blakely in 97-9181, and Jonathan Tasini in reply brief filed with proof of service. Satisfy reply brief due. (cv75) [97-9181]

4/8/98 Appellants Sonia Jaffe Robbins in 97-9181, and Barbara Garson in 97-9181 reply brief filed with proof of service. (cv75) [97-9181]

* * *

4/26/99 Case heard before WINTER CH.J., MINER, POOLER C. JJ. (TAPE: #252+253) (ca95) [97-9181]

* * *

9/24/99 Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (RKW) [97-9181] (cv77) [97-9181]

* * *

Second Circuit Docket Entries — Selected

9/24/99 Judgment filed. [Entry Date: 9/27/99] (cv77) [97-9181]

* * *

10/8/99 Appellee University Microfilm in 97-9181, Appellee Mead Data Central Co. in 97-9181, Appellee The Time Inc. in 97-9181, Appellee Newsday, Inc. in 97-9181, Appellee The New York Times in 97-9181 petition for rehearing en banc [1570623-1] with proof of service filed. (cv77) [97-9181]

* * *

10/27/99 Amicus Curiae American Society of in 97-9181, Amicus Curiae Advance Publications in 97-9181, Amicus Curiae The Copley Press, In in 97-9181, Amicus Curiae Cox Newspapers, Inc in 97-9181, Amicus Curiae Cox Interactive Medi in 97-9181, Amicus Curiae Dow Jones & Co., Inc in 97-9181, Amicus Curiae The E.W. Scripps in 97-9181, Amicus Curiae Hachette-Filipacchi in 97-9181, Amicus Curiae The Hearst Corporati in 97-9181, Amicus Curiae Knight Ridder in 97-9181, Amicus Curiae Meredith Corporation in 97-9181, Amicus Curiae National Geographic in 97-9181, Amicus Curiae News America Incorpo in 97-9181, Amicus Curiae Newspaper Associatio in 97-9181, Amicus Curiae Philadelphia in 97-9181, Amicus Curiae Playboy Enterprises, in 97-9181, Amicus Curiae Rodal Press, Inc. in 97-9181, Amicus Curiae Times

Mirror Magazin in 97-9181, Amicus Curiae Tribune Company in 97-9181, Amicus Curiae The Wahsington Post in 97-9181, Amicus Curiae Ziff-Davis Inc. in 97-9181, Amicus Curiae A.H. Belo in 97-9181, Amicus Curiae Buena Vista in 97-9181, Amicus Curiae Donrey Media Group in 97-9181, Amicus Curiae Gannett Co., Inc. in 97-9181, Amicus Curiae Gruner+Jahr USA in 97-9181, Amicus Curiae Journal in 97-9181, Amicus Curiae Lee Enterprises, Inc. in 97-9181, Amicus Curiae Macromedia Inc. in 97-9181, Amicus Curiae Magazine Publishers in 97-9181, Amicus Curiae McClatchy Company in 97-9181, Amicus Curiae Primedia Inc. in 97-9181, Amicus Curiae Stern Publishing in 97-9181, Amicus Curiae Thomson Newspapers in 97-9181 brief in support of the petition for rehearing filed with proof of service. Satisfy amicus curiae brief due. (cv77) [97-9181]

* * *

2/25/00 Amended published signed opinion filed. (RKW) (cv77) [97-9181]

* * *

4/6/00 Order FILED DENYING petition petition for rehearing in banc [1570623-1] by Appellee University Microfilm, Mead Data Central Co., The Time Inc., Newsday, Inc., The New York Times, endorsed on motion dated 10/8/99. (cv77) [97-9181]

* * *

Second Circuit Docket Entries — Selected

4/12/00 Appellee University Microfilm in 97-9181, Appellee Mead Data Central Co. in 97-9181, Appellee The Time Inc. in 97-9181, Appellee Newsday, Inc. in 97-9181 motion to stay the mandate FILED (w/pfs). [1602355-1] (cv77) [97-9181]

* * *

4/17/00 Appellant David S. Whitford in 97-9181, Appellant Sonia Jaffe Robbins in 97-9181, Appellant Margot Mifflin in 97-9181, Appellant Barbara Garson in 97-9181, Appellant Mary Kay Blakely in 97-9181, Barbara Belejack in 97-9181 papers supporting motion # [1602355-1] by Appellee University Microfilm, Mead Data Central Co., The Time Inc Newsday, Inc. filed. (cv77) [97-9181]

* * *

4/26/00 Order FILED GRANTING motion to stay issuance of mandate [1602355-1] by Appellee University Microfilm, Mead Data Central Co., The Time Inc., Newsday, Inc., endorsed on motion form dated 4/12/00. (Before RKW, RJM, RSP, C.JJs.) (cv77) [97-9181]

* * *

Second Circuit Docket Entries — Selected

7/25/00 Order FILED GRANTING motion for extended time [1656417-1] for stay of mandate pending writ of certiorari by Appellee University Microfilm, The New York Times, Newsday, Inc., Mead Data Central Co., endorsed on motion form dated 6/30/00. (Before RKW, RJM, RSP, C.JJs. by BJM) (cv77) [97-9181]

* * *

8/11/00 Notice of filing petition for writ of certiorari for Appellee University Microfilm in 97-9181, Appellee Mead Data Central Co. in 97-9181, Appellee The Time Inc. in 97-9181, Appellee Newsday, Inc. in 97-9181, Appellee The New York Times in 97-9181 dated 8/8/00 filed. Supreme Ct#: 00-201. (cv77) [97-9181]

* * * *

AMENDED COMPLAINT, DATED FEBRUARY 24, 1994, pp. 1-12, 40-43, 50-56, 60-63, 68-69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No.: 93 CIV 8678 (SS)

JURY DEMAND

JONATHAN TASINI, BARBARA BELEJACK, MARY KAY BLAKELY, BARBARA GARSON, DANIEL LAZARE, MARGOT MIFFLIN, JOAN OLECK, SONIA JAFFE ROBBINS, LINDSY VAN GELDER, DAVID S. WHITFORD, and H. BRUCE FRANKLIN

Plaintiffs,

– vs. –

NEW YORK TIMES CO., NEWSDAY INC., TIME INC., THE ATLANTIC MONTHLY CO., MEAD DATA CENTRAL CORP., and UNIVERSITY MICROFILMS INC.

Defendants.

AMENDED COMPLAINT
FOR COPYRIGHT INFRINGEMENT

Emily M. Bass, Esq. (EB-2888)
Law Offices of Emily M. Bass
330 Madison Avenue
14th Floor
New York, New York 10017-5001
(212) 953-4300

Counsel for Plaintiffs

* * *

Amended Complaint

By and through their attorney, EMILY M. BASS, ESQ., JONATHAN TASINI, BARBARA BELEJACK, MARY KAY BLAKELY, BARBARA GARSON, DANIEL LAZARE, MARGOT MIFFLIN, JOAN OLECK, SONIA JAFFE ROBBINS, LINDSY VAN GELDER, DAVID S. WHITFORD and H. BRUCE FRANKLIN (hereinafter the "Plaintiffs") allege as and for their Complaint that:

NATURE OF THE ACTION

1. This is a case of first impression. It raises questions that, to the best of plaintiffs' knowledge, have not yet been specifically addressed and/or definitively answered by any court of law, e.g.: Who owns the electronic rights to articles free-lance authors have written? The authors themselves? Their publishers in the print media? Electronic and/or CD-ROM Database producers that have purported to buy those rights from the companies responsible for printing them in the first place? The database services that thereafter transmit, broadcast or sell the articles in their new electronic incarnation? Or, the end-user or consumer who pays for the privilege of viewing the articles on-screen, sitting at his or her computer terminal?

Although the questions may well be novel ones, plaintiffs respectfully submit that the answers are anything but novel. Under recognized principles of copyright law, it is indisputably clear that free-lance authors own the electronic rights in their own work unless they have expressly transferred or assigned those rights in accordance with the Copyright Act.

[2] In the case of the eleven authors and thirty-two articles referred to below, the defendants reproduced the free-lance

authors' work in an electronic and infringing form, and authorized others to publicly perform, display and/or reproduce the authors' work, without either obtaining the authors' consent or compensating them for the usurpation.

Plaintiffs seek to have their rights declared, their injuries redressed and the defendants enjoined from further like infringements.

JURISDICTION AND VENUE

2. This action arises under the Copyright Act of 1976, 17 U.S.C. sec. 101 et seq. (hereinafter the "Copyright Act") and 28 U.S.C. sec. 2201.

3. This Court is vested with subject matter jurisdiction over this action pursuant to 28 U.S.C. sec. 1338.

4. The amount in controversy is over Fifty Thousand Dollars (U.S. $50,000).

5. Venue lies in this judicial district pursuant to 28 U.S.C. sec. 1400(a) since each defendant resides, has an agent or may be found within the district.

PARTIES

6. Plaintiff JONATHAN TASINI has been a free-lance writer for ten years and has written for a wide variety of newspapers and magazines including *The New York Times* and *Newsday*. He is currently working on a book for W.W. Norton. He is also the President of the National Writers Union, Local 1981 (UAW).

At all times pertinent to this Complaint, Jonathan Tasini has been a citizen of the United States. He currently resides in New York.

7. Plaintiff BARBARA BELEJACK has been a journalist for about ten years. Five of those years she spent reporting in Mexico. Currently, she is an adjunct in the City University of New York system and at New York University. She specializes in Latin American politics and culture.

At all times pertinent to this Complaint, Barbara Belejack has been a citizen of the United States. She currently resides in New York.

8. Plaintiff MARY KAY BLAKELY has been a columnist for *The New York Times*. She has written regularly for *Vogue* and *Ms.* as well as *Life*, *The New York Times Book Review*, *Working Woman*, [3] *Newsday*, *Woman's Day*, *Psychology Today*, *The Washington Post* and other national publications. Ms. Blakely has received the Exceptional Merit Media Award and the Matrix Award. She is also the author of the critically acclaimed memoir *Wake Me When It's Over*, the subject of a forthcoming film made by ABC productions, and the co-editor of *Pulling Our Own Strings: A Collection of Feminist Humor and Satire* (Indiana University Press, 1980). Ms. Blakely has taught at Indiana University/Purdue University for five years and is currently a member of the faculty at The New School for Social Research.

At all times pertinent to this Complaint, Mary Kay Blakely has been a citizen of the United States. She currently resides in Connecticut.

9. Plaintiff BARBARA GARSON is the author of the play *MacBird*, which sold over half a million copies and of two classic books about work, *All The Livelong Day* (Doubleday) and *The Electronic Sweatshop* (Simon and Schuster), both available in paperback from Penguin Books. Other plays include *The Dinosaur Door*, *Going Co-op* and *Security*. She has been a free-lance contributor to periodicals including *The New York Times*, *The Los Angeles Times*, *The Washington Post*, the *Village Voice*, and *Harpers*, among others, for over 25 years. She has received a Guggenheim fellowship, an National Endowment for the Arts fellowship, and an OBIE.

At all times pertinent to this Complaint, Barbara Garson has been a citizen of the United States. She currently resides in New York.

10. Plaintiff DANIEL LAZARE has been a newspaper reporter, editorial writer, and columnist for fourteen years. In 1988, he went free-lance and began writing for publications as diverse as *Art & Antiques*, *The Wall Street Journal*, and the *Village Voice*. He typically writes on topics ranging from the art market to the urban crisis to the war on drugs. He is presently writing a book on the U.S. Constitution for Harcourt Brace Jovanovich tentatively titled *The Frozen Republic: America and its Immovable Constitution*. It is slated for publication in Fall 1995.

At all times pertinent to this Complaint, Daniel Lazare has been a citizen of the United States. He currently resides in New York.

11. Plaintiff MARGOT MIFFLIN regularly writes for *Entertainment Weekly*, *Elle*, *Art News*, *The New York Times Book Review*, and *The Daily News*. She has also contributed to *The New Yorker* and the *Village Voice*. Her writing is featured in *The Compact Reader* (St. Martin's Press 1993). She currently teaches magazine journalism at New York University.

[4] At all times pertinent to this Complaint, Margot Mifflin has been a citizen of the United States. She currently resides in New York.

12. Plaintiff JOAN OLECK has been a journalist for seventeen years. She has worked for the *Detroit News*, the *Virginian-Pilot Ledger Star*, the *News and Observer* and the *Lowell Sun*. She has been an active free-lance writer since 1986. Her work has recently been published in *The New York Times*, *Washington Journalism Review* and *New Woman*. She is currently a business writer/associate editor for *Restaurant Business Magazine*.

At all times pertinent to this Complaint, Joan Oleck has been a citizen of the United States. She currently resides in New York.

13. Plaintiff SONIA JAFFE ROBBINS has been an editor, writer, and teacher over the past twenty-four years. Her articles have been published in the *Village Voice*, the *VLS*, *The Philadelphia Inquirer*, the *Columbia Journalism Review*, *Newsday*, *The Women's Review of Books*, *New Directions*, and *Women and Language News*.

At all times pertinent to this Complaint, Sonia Jaffe Robbins has been a citizen of the United States. She currently resides in New York.

14. Plaintiff LINDSY VAN GELDER has been a journalist since 1967. Her work has appeared in *Town & Country*, *Rolling Stone*, *New York*, *Ms.*, the *New York Daily News Magazine*, the *Los Angeles Times Magazine*, *Allure*, *Lear's*, *McCall's*, *Omni*, *PC* and numerous other publications. She and her partner, Pamela Robin Brandt, are currently at work on a book about lesbians for Simon & Schuster. Their previous book, *Are You Two . . . Together?* (Random House) won third place for Best Guidebook of 1991 in the Lowell Thomas Travel Journalism Competition. Other honors Van Gelder has received include winning the Newspaper Guild's Page One Award in Local Reporting, being named by NASA as a semi-finalist in the Journalist in Space program, and being listed in numerous editions of Who's Who.

At all times pertinent to this Complaint, Lindsy Van Gelder has been a citizen of the United States. She currently resides in Florida.

15. Plaintiff DAVID S. WHITFORD has been a free-lance journalist for eight years. His articles have been published in *Sports Illustrated*, *Outside*, *Newsday*, *Boston Business* and *Sport* magazine, where Mr. Whitford has a one year contract. He is the author of three books: *A Payroll to Meet: A Story of Greed, Corruption and Football at SMU* (Macmillan, 1989); *Extra Innings: A Season in the Senior League* (Harper Collins, 1991); and *Playing Hardball: The*

High-Stakes Battle for Baseball's New Franchises [5] (Doubleday, 1993). Mr. Whitford is currently employed by Fidelity Investments where his title is Senior Writer.

At all times pertinent to this Complaint, David S. Whitford has been a citizen of the United States. He currently resides in Massachusetts.

16. Plaintiff H. BRUCE FRANKLIN is the author of well over a hundred articles and the author or editor of sixteen books. His articles have appeared in numerous leading national magazines and newspapers, including *The Nation*, *Parade*, *Progressive*, *Saturday Review*, *Book World*, *The New York Times*, *Philadelphia Inquirer*, *San Francisco Chronicle*, *St. Louis Post-Dispatch*, *San Jose Mercury*, *Newsday*, *Monthly Review*, *Change*, *Chronicle of Higher Education*, *Issac Asimov's Science Fiction Magazine*, *Science*, *The Bulletin of the Atomic Scientists*, and *American Film*, as well as several encyclopedias. Publishers of his books include Doubleday, Harper & Row, Grove Press, Oxford University Press, Stanford University Press, Rutgers University Press, Putnam's, Lippincott, and New American Library. He is currently the John Cotton Dana Professor of English and American Studies at Rutgers University — Newark.

At all times pertinent to this Complaint, H. Bruce Franklin has been a citizen of the United States. He currently resides in New Jersey.

17. Defendant NEW YORK TIMES COMPANY was duly incorporated in the State of New York in 1896. At all

times pertinent to the Complaint, it has maintained offices at 229 West 43rd Street, New York, N.Y. 10036 and has been present and doing business in the state of New York. The defendant NEW YORK TIMES COMPANY publishes *The New York Times*, a daily newspaper of general circulation.

18. Defendant NEWSDAY INC. is a corporation duly authorized to transact business in the State of New York. It is a wholly owned subsidiary of the Times Mirror Company. At all times pertinent to the Complaint, Newsday Inc. has maintained offices at 235 Pinelawn Road, Melville, New York 11747, and has been present and doing business in the state of New York. The defendant NEWSDAY INC. publishes *Newsday* and *New York Newsday*. Defendant Newsday was duly incorporated in the State of New York in 1970.

19. Defendant TIME INC. is a subsidiary of Time Warner, Inc., which was duly incorporated in the State of Delaware in 1983 and is the successor to a New York corporation which was originally organized in 1922. On information and belief, at all times pertinent to the Complaint, the defendant has maintained offices at the Time & Life Building, Rockefeller Center, New York, N.Y. 10020 and has been qualified to do business in the State of New York. The defendant publishes *Sports Illustrated*, a specialty magazine.

Upon further information and belief, defendant Time Inc. [6] is present and doing business in the State of New York.

20. Defendant ATLANTIC MONTHLY COMPANY was duly incorporated in the State of Massachusetts in 1980 and has been qualified to do business in the State of New York since 1986. At all times pertinent to this complaint, the Atlantic Monthly Company has maintained offices at 1290 Avenue of the Americas, Suite 600, New York, New York 10104, and has been present and doing business in the State of New York. The defendant Atlantic Monthly Company publishes the *Atlantic*.

21. Defendant MEAD DATA CENTRAL CORPORATION ("MDC") is a wholly-owned subsidiary of the Mead Corporation and the subsidiary of Mead that is responsible for marketing electronic information services worldwide, including *inter alia* NEXIS, a computer-assisted news, financial, marketing and general information retrieval service. Mead Data Central's services are distributed and/or conveyed to subscribers via the subscribers' own computer equipment, and on custom terminals supplied by MDC.

On information and belief, the defendant maintains offices at 200 Park Avenue, New York, N.Y. 10166. Upon further information and belief, defendant MDC is present and does business within the State of New York.

22. Defendant UNIVERSITY MICROFILMS INC. ("UMI") is a subsidiary of the Bell & Howell Company. Upon information and belief, as of the filing of this Complaint, UMI maintained offices at 150 Fifth Avenue, New York, N.Y. 11501. Upon further information and belief, UMI produces and sells CD-ROM products to the public that consist of and contain the text of New York Times' articles, including *inter alia* articles written by plaintiffs.

All causes of action that have been asserted against UMI arise out of UMI's transactions with the New York Times and its commission of tortious acts by UMI within New York, and the commission of tortious acts by UMI outside the State of New York causing injury to plaintiffs' copyrights. Upon information and belief, UMI regularly solicits business in New York, engages in a persistent course of conduct within New York, derives substantial revenue from goods used or consumed or services rendered within New York, expects or should reasonably expect its acts of copyright infringement to have consequences within New York, and derives substantial revenue from interstate commerce.

23. *Newsday*, *New York Newsday*, *The New York Times*, *Sports Illustrated* and *The Atlantic* are carried on NEXIS.

24. None of the plaintiffs is employed by the defendant New York Times Co., defendant Newsday Inc., defendant Time Inc., defendant Atlantic Monthly Company, defendant Mead Data Central Corporation, or the defendant University Microfilms Inc. or [7] has worked or agreed to work for any of the said defendants on a "work for hire" basis.

25. Similarly, none of the articles plaintiffs wrote for the defendants that are the subject of this Complaint were written pursuant to a work for hire agreement.

Amended Complaint

FIRST CAUSE OF ACTION
(Plaintiff Jonathan Tasini Against
Defendants New York Times and
Mead Data Central Corporation)

26. Plaintiff Tasini repeats and realleges each and every allegation of the complaint numbered "1" through "25" as if separately set forth at length and incorporated herein.

27. On or before the dates set forth below under the heading "Date of Publication," in paragraph 31 below, plaintiff Tasini created and wrote the original article listed under the heading "Title of Article," in paragraph 31 below, for publication in the New York Times. The article appeared on the date indicated.

28. The article contained a substantial amount of material wholly original with plaintiff, which at all times constituted and still constitutes copyrightable subject matter under the laws of the United States.

29. Plaintiff Tasini secured and is entitled to exclusive rights and privileges in and to the copyright of the article under 17 U.S.C. sec. 106.

30. In addition to having been the creator and author of the article, plaintiff Tasini registered the copyright to his article with the Registrar of Copyrights, which subsequently issued a certificate evidencing the registration.

31. The article referred to may be described as follows:

Title of Article	Date of Publication	Date of Registration	Certificate Number
"Can It Be Morning in Teamsterland"	12/31/91	3/8/93	TX3547590

32. Plaintiff Tasini granted the defendant New York Times first, one time, North American print publication rights with respect to the above article. Upon publication of the article in a printed edition of the New York Times, these rights were fully exhausted.

33. At no time did plaintiff Tasini convey, transfer or assign to the defendant New York Times Company or defendant Mead [8] Data Central Company any on-line or database rights nor did plaintiff Tasini agree that either of the defendants could include the article referred to in paragraph 31 above in an electronic database or arrange for its inclusion in a database by a database producer or service.

34. By the same token, at no time did plaintiff Tasini agree to give up exclusive control of the right he had *inter alia* to authorize others to electronically copy his work or to publicly display or perform it.

35. At some point on or after the publication date listed in paragraph 31 above, the defendant New York Times Company provided the defendant Mead Data Central Corporation with a copy of the article referred to there or with an already electronically reproduced version of all or a

portion of the printed issue in which the article appeared. It did so for the purpose of enabling the article it provided *inter alia* to be included in an electronic database.

36. On information and belief, defendant New York Times provided this information pursuant to an agreement or agreements with the defendant Mead Data Central Corporation by the terms of which it licensed Mead to copy the aforementioned article, *inter alia*, and make it available to its subscribers for purposes of display, electronic performance and/or copying.

37. In so doing, the defendants New York Times and Mead not only improperly trafficked in plaintiff's work, but purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

38. After receiving the information referred to in the preceding two paragraphs, the defendant Mead Data Central Corp. itself then either included plaintiff's article in an electronic database or placed the database in which plaintiff's article had already been included on-line so that it could be accessed by persons and/or entities subscribing to its service.

39. Since that time, the article has been available on-line to members of the public or persons or entities using this service.

40. It has been accessed, displayed, downloaded and printed out on at least one occasion.

41. As recently as February 17, 1994, the article was still available on-line.

42. On information and belief, throughout the period plaintiff's article has been on-line, defendant Mead has been promoting NEXIS as *the* database that truly affords subscribers access to full text.

[9] 43. By so advertising itself, defendant Mead has implicitly represented not only that plaintiff's article is on its database, *inter alia*, but also that its subscribers are authorized to access plaintiff's article, and publicly perform, display and/or copy it.

44. On information and belief, at least a portion of defendant Mead Data Central's income has derived from the perception that it can deliver full text.

45. Perceptions aside, neither Defendant New York Times nor defendant Mead Data Central has ever obtained plaintiff Tasini's consent to the inclusion of the article referred to in paragraph 31 in an electronic database, nor to the distribution, transmission and/or communication of an electronic copy of the article to members of the public. Nor has the plaintiff ever endowed either of the defendants with the authority to decide who can display, copy or perform plaintiff's work.

46. Further, neither of said defendants has compensated plaintiff Tasini for their electronic exploitation, usurpation and/or infringement of plaintiff's rights.

47. Notwithstanding these facts, on information and belief, the defendant Mead Data Central Corporation has received income and remitted royalties to the defendant New York Times that derive from and/or are attributable to the infringement of plaintiff's rights.

48. The conduct complained of *inter alia* in paragraphs 35 to 46, above, has violated and continues to violate this plaintiff's exclusive rights under the copyright referred to in paragraph 31 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute or license distribution of copies of the copyrighted work, to publicly perform or display the copyrighted work or license others to publicly perform or display the copyrighted work on electronic media, and to authorize all of the above.

49. Defendant New York Times is not only liable for its own acts, but is also vicariously liable as a contributory infringer for the infringement effected by the defendant database service.

50. It has contributed to the infringement of plaintiff's rights by the database service in the following manner, *inter alia*: On information and belief, when the New York Times licensed defendant Mead Data Central Corporation to include the article set forth in paragraph 31 within its database and offer it to its subscribers for public display and/or electronic performance and copying, defendant New York Times knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe

plaintiff's copyright. Because the New York Times entered into a licensing arrangement with defendant Mead [10] to allow public display of the infringed article and received royalties for such an arrangement, defendant New York Times caused or materially contributed to the acts of copyright infringement committed by Mead Data Central. As a consequence of these acts, the New York Times participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

51. As a consequence of the defendants' infringement, plaintiff Tasini has suffered, and will continue to suffer, economic losses and injury to his ownership in the aforementioned literary property.

SECOND CAUSE OF ACTION
(Plaintiff Jonathan Tasini Against
Defendants New York Times and
University Microfilms Inc.)

52. Plaintiff Tasini repeats and realleges each and every allegation of the complaint numbered "1" through "51" as if separately set forth at length and incorporated herein.

53. At no time did plaintiff Tasini convey, transfer or assign to the defendant New York Times Company or defendant University Microfilms any CD-ROM or database rights nor did plaintiff Tasini agree that either of the defendants could include the article listed in paragraph 31 above in a CD-ROM based database or arrange for its inclusion in a CD-ROM database by a database producer or service.

54. By the same token, at no time did plaintiff Tasini agree to give up exclusive control of the right he had *inter alia* to authorize others to electronically copy his work or to publicly display or perform it.

55. Notwithstanding this fact, at some point on or after the publication date listed in paragraph 31 above, defendant New York Times Company provided University Microfilms with a copy of the article listed there or with an already electronically reproduced version of all or a portion of the printed issue in which the article appeared. It did so for the purpose of enabling the article it provided *inter alia* to be included in a CD-ROM database.

56. On information and belief, defendant New York Times provided this information pursuant to an agreement or agreements with the defendant University Microfilms by the terms of which it licensed University Microfilms to copy the aforementioned article *inter alia* and make it available to its subscribers for purposes of display, electronic performance and/or copying.

57. In so doing, the defendants New York Times and University Microfilms not only improperly trafficked in plaintiff's work, but [11] purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

58. After receiving the information referred to in the preceding two paragraphs, the defendant University Microfilms itself then either included plaintiff's article in a CD-ROM database or placed the database in which plaintiff's

article was included on a CD-ROM so that it could be accessed by persons and/or entities subscribing to its service or purchasers of its CD-ROMs.

59. Since that time, the article has been replicated, distributed and made available to members of the public or persons or entities who own defendants' CD-ROM products.

60. By including plaintiff's article in its CD-ROM products, defendant University Microfilms has implicitly authorized the purchasers and users of its products to access plaintiff's article and publicly perform and display plaintiff's work.

61. On information and belief, defendant University Microfilms has derived at least a portion of its income from its actual or perceived ability to provide complete text.

62. Neither Defendant New York Times nor defendant University Microfilms ever obtained Plaintiff Tasini's consent to the inclusion of the article listed in paragraph 31 in a CD-ROM database, nor to the marketing and/or distribution of a CD-ROM product including the article.

63. Further, neither of said defendants has compensated Plaintiff Tasini for their electronic exploitation, usurpation and infringement of plaintiff's rights.

64. Notwithstanding these facts, on information and belief, the defendant University Microfilms has received income and remitted royalties to the defendant New York Times that derived from and/or are attributable to the infringement of plaintiff's rights.

65. The conduct complained of *inter alia* in paragraphs 55 to 63 above has violated and continues to violate this plaintiff's exclusive rights under the copyright referred to in paragraph 31 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute or license distribution of copies of the copyrighted work, to publicly perform or display the copyrighted work or license others to publicly perform or display the copyrighted work on electronic media, and to authorize all of the above.

66. Defendant New York Times is not only liable for its own [12] acts, but is also vicariously liable as a contributory infringer for the infringement effected by the defendant University Microfilms.

67. Defendant New York Times has contributed to the infringement in the following manner, *inter alia*: On information and belief, when the New York Times licensed defendant University Microfilms Inc. to include the article set forth in paragraph 31 within its database and offer them to its subscribers for public display and/or electronic performance and copying, defendant New York Times knew or had reason to know that defendant University Microfilms planned to engage in conduct that would infringe plaintiff's copyright. Because the New York Times entered into a licensing arrangement with defendant University Microfilms to allow public display of the infringed article and received royalties for such an arrangement, defendant New York Times caused or materially contributed to the acts of copyright infringement committed by the University Microfilms. As a

consequence of these acts, the New York Times participated in, supervised and controlled the infringements committed by defendant University Microfilms. As a further consequence, it is vicariously liable for those infringements.

68. As a consequence of the defendants' infringement, plaintiff Tasini has suffered, and will continue to suffer, economic losses and injury to his ownership in the aforementioned literary properties.

* * *

[40] * * *

THIRTEENTH CAUSE OF ACTION
(Plaintiff Jonathan Tasini Against
Defendants Newsday, Inc. and
Mead Data Central Corporation)

284. Plaintiff Tasini repeats and realleges each and every allegation of the complaint numbered "1" through "283" as if separately set forth at length and incorporated herein.

285. On or before the dates set forth below under the heading "Date of Publication," plaintiff Tasini created and wrote the original articles listed under the heading "Title of Article," for publication in Newsday. The articles appeared on the dates indicated.

286. The articles contained a substantial amount of material wholly original with plaintiff, which at all times constituted and still constitutes copyrightable subject matter under the laws of the United States.

287. Plaintiff Tasini secured and is entitled to exclusive rights and privileges in and to the copyright of each article under [41] 17 U.S.C. sec. 106.

288. In addition to having been the creator and author of each article, plaintiff Tasini registered each with the Registrar of Copyrights and subsequently received a certificate from the Copyright Office evidencing the registration.

289. The articles meeting this description include:

Title of Article	Date of Publication	Date of Registration	Certificate Number
"Say Adios to American Jobs"	10/28/92	3/8/93	TX 3 547 593
"A Union Boss's Labor Pains"	4/16/93	6/2/93	TX 3 547 589

290. Plaintiff Tasini granted defendant Newsday first, one time, North American print publication rights with respect to each of the above articles. Upon the publication of each article in a printed edition of Newsday, these rights were fully exhausted.

291. At no time did plaintiff Tasini convey, transfer or assign to defendant Newsday Inc. or defendant Mead Data Central Company any on-line or database rights nor did plaintiff Tasini agree that either of the defendants could include any of the articles listed in paragraph 289 above in an electronic database or arrange for their inclusion in a database by a database producer or service.

292. By the same token, at no time did plaintiff Tasini agree to give up exclusive control of the right he had *inter alia* to authorize others to electronically copy his work or to publicly display or perform it.

293. At some point on or after the publication dates listed in paragraph 289 above, the defendant Newsday Inc. provided the defendant Mead Data Central Corporation with a copy of each article listed there or with an already electronically reproduced version of all or a portion of the printed issue in which each article appeared. It did so for the purpose of enabling the articles it provided *inter alia* to be included in an electronic database.

294. On information and belief, defendant Newsday provided these materials and/or information pursuant to an agreement or agreements with the defendant Mead Data Central Corporation by the terms of which it licensed Mead to copy each of the aforementioned articles, *inter alia*, and make them available to its subscribers for purposes of display, electronic performance and/or copying.

[42] 295. In so doing, the defendants Newsday and Mead not only improperly trafficked in plaintiff's work, but purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

296. After receiving the materials and/or information referred to in the preceding two paragraphs, the defendant Mead Data Central Corp. itself then either included each of plaintiff's articles in an electronic database or placed each of the databases in which plaintiff's articles had already been included on-line so that they could be accessed by persons and/or entities subscribing to its service.

297. Since that time, each of the articles has been available on-line to members of the public or persons or entities using this service.

298. Each of them has been accessed, displayed, downloaded and printed out on at least one occasion.

299. As recently as February 17, 1994, each of the articles was still available on-line.

300. On information and belief, throughout the period plaintiff's articles have been on-line, defendant Mead has been promoting NEXIS as *the* database that truly affords subscribers access to full text.

301. By so advertising itself, defendant Mead has implicitly represented not only that plaintiff's articles are on its database, *inter alia*, but also that its subscribers are authorized to access plaintiff's articles, and publicly perform, display and/or copy them.

302. On information and belief, at least a portion of defendant Mead Data Central's income has derived from the perception that it can deliver full text.

303. Perceptions aside, neither defendant Newsday nor defendant Mead Data Central has ever obtained plaintiff Tasini's consent to the inclusion of the articles referred to in paragraph 289 in an electronic database, nor to the distribution, transmission and/or communication of an electronic copy of those articles to members of the public. Nor has the plaintiff ever endowed either of the defendants with the authority to decide who can display, copy or perform plaintiff's work.

304. Further, neither of said defendants has compensated plaintiff Tasini for their electronic exploitation, usurpation and/or infringement of plaintiff's rights.

305. Notwithstanding these facts, on information and belief, [43] the defendant Mead Data Central Corporation has received income and remitted royalties to the defendant Newsday that derive from and/or are attributable to the infringement of plaintiff's rights.

306. The conduct complained of *inter alia* in paragraphs 293 to 304, above, has violated and continues to violate this plaintiff's exclusive rights under the copyrights referred to in paragraph 289 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted works, to prepare derivative works based upon the copyrighted works, to distribute or license distribution of copies of the copyrighted works, to publicly perform or display the copyrighted works or license others to publicly perform or display the copyrighted works on electronic media, and to authorize all of the above.

307. Defendant Newsday is not only liable for its own acts, but is also vicariously liable as a contributory infringer for the infringements effected by the defendant database service.

308. It has contributed to the infringement of plaintiff's rights by the database service in the following manner, *inter alia*: On information and belief, when Newsday licensed defendant Mead Data Central Corporation to include the articles set forth in paragraph 289 within its database and offer it to its subscribers for public display and/or electronic

performance and copying, defendant Newsday knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe plaintiff's copyrights. Because Newsday entered into a licensing arrangement with defendant Mead to allow public display of the infringed articles and received royalties for such an arrangement, defendant Newsday caused or materially contributed to the acts of copyright infringement committed by Mead Data Central. As a consequence of these acts, Newsday participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

309. As a consequence of the defendants various infringements, plaintiff Tasini has suffered, and will continue to suffer, economic losses and injury to his ownership in the aforementioned literary properties.

* * *

[50] . . . rights by the database service in the following manner, *inter alia*: On information and belief, when Newsday licensed defendant Mead Data Central Corporation to include the articles set forth in paragraph 341 within its database and offer it to its subscribers for public display and/or electronic performance and copying, defendant Newsday knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe plaintiff's copyrights. Because Newsday entered into a licensing arrangement with defendant Mead to allow public display of the infringed articles and received royalties for such an arrangement, defendant Newsday caused or

materially contributed to the acts of copyright infringement committed by Mead Data Central. As a consequence of these acts, Newsday participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

361. As a consequence of the defendants' various infringements, plaintiff Lazare has suffered, and will continue to suffer, economic losses and injury to his ownership in the aforementioned literary properties.

SIXTEENTH CAUSE OF ACTION
(Plaintiff Barbara Garson Against
Defendants Newsday, Inc. and
Mead Data Central Corporation)

362. Plaintiff Garson repeats and realleges each and every allegation of the complaint numbered "1" through "361" as if separately set forth at length and incorporated herein.

363. On or before the dates set forth below under the heading "Date of Publication," plaintiff Garson created and wrote the original articles listed under the heading "Title of Article," for publication in Newsday. The articles appeared on the dates indicated.

364. The articles contained a substantial amount of material wholly original with plaintiff, which at all times constituted and still constitutes copyrightable subject matter under the laws of the United States.

365. Plaintiff Garson secured and is entitled to exclusive rights and privileges in and to the copyright of each article under 17 U.S.C. sec. 106.

366. In addition to having been the creator and author of each article, plaintiff Garson registered each with the Registrar of Copyrights and subsequently received a certificate from the Copyright Office evidencing the registration.

367. The articles meeting this description include:

[51] Title of Article	Date of Publication	Date of Registration	Certificate Number
"Health Care Vs. Death Care"	11/12/91	6/24/93	TX3602470
"The Common Good is Swept Aside by" the 'Me Generation'	11/17/91	6/24/93	TX3602473
"In 'JFK' We Feel the Pull of Our Lost Innocence"	1/19/92	6/24/93	TX3602472
"Networks that Serve the Unconnected"	6/28/92	6/24/93	TX3602468

368. Plaintiff Garson granted defendant Newsday first, one time, North American print publication rights with

respect to each of the above articles. Upon the publication of each article in a printed edition of Newsday, these rights were fully exhausted.

369. At no time did plaintiff Garson convey, transfer or assign to defendant Newsday Inc. or defendant Mead Data Central Company any on-line or database rights nor did plaintiff Garson agree that either of the defendants could include any of the articles listed in paragraph 367 above in an electronic database or arrange for their inclusion in a database by a database producer or service.

370. By the same token, at no time did plaintiff Garson agree to give up exclusive control of the right she had *inter alia* to authorize others to electronically copy her work or to publicly display or perform it.

371. At some point on or after the publication dates listed in paragraph 367 above, the defendant Newsday Inc. provided the defendant Mead Data Central Corporation with a copy of each article listed there or with an already electronically reproduced version of all or a portion of the printed issue in which each article appeared. It did so for the purpose of enabling the articles it provided *inter alia* to be included in an electronic database.

372. On information and belief, defendant Newsday provided these materials and/or information pursuant to an agreement or agreements with the defendant Mead Data Central Corporation by the terms of which it licensed Mead to copy each of the aforementioned articles, *inter alia*, and make them available to its subscribers for purposes of display, electronic performance and/or copying.

373. In so doing, the defendants Newsday and Mead not only [52] improperly trafficked in plaintiff's work, but purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

374. After receiving the materials and/or information referred to in the preceding two paragraphs, the defendant Mead Data Central Corp. itself then either included each of plaintiff's articles in an electronic database or placed each of the databases in which plaintiff's articles had already been included on-line so that they could be accessed by persons and/or entities subscribing to its service.

375. Since that time, each of the articles has been available on-line to members of the public or persons or entities using this service.

376. Each of them has been accessed, displayed, downloaded and printed out on at least one occasion.

377. As recently as February 18, 1994, each of the articles was still available on-line.

378. On information and belief, throughout the period plaintiff's articles have been on-line, defendant Mead has been promoting NEXIS as *the* database that truly affords subscribers access to full text.

379. By so advertising itself, defendant Mead has implicitly represented not only that plaintiff's articles are on its database, *inter alia*, but also that its subscribers are

authorized to access plaintiff's articles, and publicly perform, display and/or copy them.

380. On information and belief, at least a portion of defendant Mead Data Central's income has derived from the perception that it can deliver full text.

381. Perceptions aside, neither defendant Newsday nor defendant Mead Data Central has ever obtained plaintiff Garson's consent to the inclusion of the articles referred to in paragraph 367 in an electronic database, nor to the distribution, transmission and/or communication of an electronic copy of those articles to members of the public. Nor has the plaintiff ever endowed either of the defendants with the authority to decide who can display, copy or perform plaintiff's work.

382. Further, neither of said defendants has compensated plaintiff Garson for their electronic exploitation, usurpation and/or infringement of plaintiff's rights.

383. Notwithstanding these facts, on information and belief, the defendant Mead Data Central Corporation has received income and [53] remitted royalties to the defendant Newsday that derive from and/or are attributable to the infringement of plaintiff's rights.

384. The conduct complained of *inter alia* in paragraphs 371 to 382, above, has violated and continues to violate this plaintiff's exclusive rights under the copyrights referred to in paragraph 367 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted works, to prepare derivative works based upon the copyrighted works, to distribute or license distribution

of copies of the copyrighted works, to publicly perform or display the copyrighted works or license others to publicly perform or display the copyrighted works on electronic media, and to authorize all of the above.

385. Defendant Newsday is not only liable for its own acts, but is also vicariously liable as a contributory infringer for the infringements effected by the defendant database service.

386. It has contributed to the infringement of plaintiff's rights by the database service in the following manner, *inter alia*: On information and belief, when Newsday licensed defendant Mead Data Central Corporation to include the articles set forth in paragraph 367 within its database and offer it to its subscribers for public display and/or electronic performance and copying, defendant Newsday knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe plaintiff's copyrights. Because Newsday entered into a licensing arrangement with defendant Mead to allow public display of the infringed articles and received royalties for such an arrangement, defendant Newsday caused or materially contributed to the acts of copyright infringement committed by Mead Data Central. As a consequence of these acts, Newsday participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

387. As a consequence of the defendants' various infringements, plaintiff Garson has suffered, and will continue to suffer, economic losses and injury to her ownership in the aforementioned literary properties.

SEVENTEENTH CAUSE OF ACTION
(Plaintiff David Whitford Against
Defendants Newsday, Inc. and
Mead Data Central Corporation)

388. Plaintiff Whitford repeats and realleges each and every allegation of the complaint numbered "1" through "387" as if separately set forth at length and incorporated herein.

389. On or before the dates set forth below under the heading "Date of Publication," plaintiff Whitford created and wrote the [54] original article referred to under the heading "Title of Article," for publication in Newsday. The article appeared on the date indicated.

390. The article contained a substantial amount of material wholly original with plaintiff, which at all times constituted and still constitutes copyrightable subject matter under the laws of the United States.

391. Plaintiff Whitford secured and is entitled to exclusive rights and privileges in and to the copyright of the article under 17 U.S.C. sec. 106.

392. In addition to having been the creator and author of the article, plaintiff Whitford registered the copyright in his article with the Registrar of Copyrights and subsequently received a certificate from the Copyright Office evidencing the registration.

393. The article referred to may be described as follows:

Title of Article	Date of Publication	Date of Registration	Certificate Number
"Baseball, A Business, Is Striking Out"	8/14/92	6/1/93	TX3568919

394. Plaintiff Whitford granted defendant Newsday first, one time, North American print publication rights with respect to the above article. Upon publication of the article in a printed edition of Newsday, these rights were fully exhausted.

395. At no time did plaintiff Whitford convey, transfer or assign to defendant Newsday Inc. or defendant Mead Data Central Company any on-line or database rights nor did plaintiff Whitford agree that either of the defendants could include the article referred to in paragraph 393 above in an electronic database or arrange for its inclusion in a database by a database producer or service.

396. By the same token, at no time did plaintiff Whitford agree to give up exclusive control of the right he had *inter alia* to authorize others to electronically copy his work or to publicly display or perform it.

397. At some point on or after the publication date referred to in paragraph 393 above, the defendant Newsday Inc. provided the defendant Mead Data Central Corporation with a copy of plaintiff's article or with an already

electronically reproduced version of all or a portion of the printed issue in which plaintiff's article appeared. It did so for the purpose of enabling the article it provided *inter alia* to be included in an electronic database.

[55] 398. On information and belief, defendant Newsday provided this material and/or information pursuant to an agreement or agreements with the defendant Mead Data Central Corporation by the terms of which it licensed Mead to copy the aforementioned article, *inter alia*, and make it available to its subscribers for purposes of display, electronic performance and/or copying.

399. In so doing, the defendants Newsday and Mead not only improperly trafficked in plaintiff's work, but purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

400. After receiving the materials and/or information referred to in the preceding two paragraphs, the defendant Mead Data Central Corp. itself then either included plaintiff's article in an electronic database or placed the database in which plaintiff's article had already been included on-line so that it could be accessed by persons and/or entities subscribing to its service.

401. Since that time, plaintiff's article has been available on-line to members of the public or persons or entities using this service.

402. It has been accessed, displayed, downloaded and printed out on at least one occasion.

403. As recently as February 18, 1994, the article was still available on-line.

404. On information and belief, throughout the period plaintiff's articles have been on-line, defendant Mead has been promoting NEXIS as *the* database that truly affords subscribers access to full text.

405. By so advertising itself, defendant Mead has implicitly represented not only that plaintiff's article is on its database, *inter alia*, but also that its subscribers are authorized to access plaintiff's article, and publicly perform, display and/or copy it.

406. On information and belief, at least a portion of defendant Mead Data Central's income has derived from the perception that it can deliver full text.

407. Perceptions aside, neither defendant Newsday nor defendant Mead Data Central has ever obtained plaintiff Whitford's consent to the inclusion of the articles referred to in paragraph 393 in an electronic database, nor to the distribution, transmission and/or communication of an electronic copy of the article to members of the public. Nor has the plaintiff ever endowed either of the defendants with the authority to decide who can display, copy or perform plaintiff's work.

[56] 408. Further, neither of said defendants has compensated plaintiff Whitford for their electronic exploitation, usurpation and/or infringement of plaintiff's rights.

409. Notwithstanding these facts, on information and belief, the defendant Mead Data Central Corporation has received income and remitted royalties to the defendant Newsday that derive from and/or are attributable to the infringement of plaintiff's rights.

410. The conduct complained of *inter alia* in paragraphs 397 to 408, above, has violated and continues to violate this plaintiff's exclusive rights under the copyright referred to in paragraph 393 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute or license distribution of copies of the copyrighted work, to publicly perform or display the copyrighted work or license others to publicly perform or display the copyrighted work on electronic media, and to authorize all of the above.

411. Defendant Newsday is not only liable for its own acts, but is also vicariously liable as a contributory infringer for the infringement effected by the defendant database service.

412. It has contributed to the infringement of plaintiff's rights by the database service in the following manner, *inter alia*: On information and belief, when Newsday licensed defendant Mead Data Central Corporation to include the article set forth in paragraph 393 within its database and offer

it to its subscribers for public display and/or electronic performance and copying, defendant Newsday knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe plaintiff's copyright. Because Newsday entered into a licensing arrangement with defendant Mead to allow public display of — the infringed article and received royalties for such an arrangement, defendant Newsday caused or materially contributed to the acts of copyright infringement committed by Mead Data Central. As a consequence of these acts, Newsday participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

413. As a consequence of the defendants' infringement, plaintiff Whitford has suffered, and will continue to suffer, economic losses and injury to his ownership in the aforementioned literary property.

* * *

[60] NINETEENTH CAUSE OF ACTION
(Plaintiff David Whitford Against
Defendants Time Inc. Magazine Co. and
Mead Data Central Corporation)

440. Plaintiff Whitford repeats and realleges each and every allegation of the complaint numbered "1" through "439" as if separately set forth at length and incorporated herein.

441. On or before the dates set forth below under the heading "Date of Publication," plaintiff Whitford created and wrote the original article referred to under the heading "Title of Article," for publication in Sports Illustrated. The article appeared on the date indicated.

442. The article contained a substantial amount of material wholly original with plaintiff, which at all times constituted and still constitutes copyrightable subject matter under the laws of the United States.

443. Plaintiff Whitford secured and is entitled to exclusive rights and privileges in and to the copyright of the article under 17 U.S.C. sec. 106.

444. In addition to having been the creator and author of the article, plaintiff Whitford registered the copyright to his article with the Registrar of Copyrights and subsequently received a certificate from the Copyright Office evidencing the registration.

445. The article referred to may be described as follows:

Title of Article	Date of Publication	Date of Registration	Certificate Number
"Glory Amid Grief"	7/15/91	6/01/93	TX3567078

446. Plaintiff Whitford granted defendant Time Inc. Magazine Co. first, one time, North American print publication rights with respect to the above article. Upon publication of the article in a printed edition of Sports Illustrated, these rights were fully exhausted.

447. At no time did plaintiff Whitford convey, transfer or assign to defendant Time Inc. Magazine Co. or defendant Mead Data Central Company any on-line or database rights nor did plaintiff Whitford agree that either of the defendants could include the article referred to in paragraph 445 above in an electronic database or arrange for its inclusion in a database by a database producer or service.

448. By the same token, at no time did plaintiff Whitford agree to give up exclusive control of the right he had *inter alia* [61] to authorize others to electronically copy his work or to publicly display or perform it.

449. At some point on or after the publication date referred to in paragraph 445 above, the defendant Time Inc. Magazine Co. provided the defendant Mead Data Central Corporation with a copy of plaintiff's article or with an already electronically reproduced version of all or a portion of the printed issue in which plaintiff's article appeared. It did so for the purpose of enabling the article it provided *inter alia* to be included in an electronic database.

450. On information and belief, defendant Time Inc. Magazine Co. provided this material and/or information pursuant to an agreement or agreements with the defendant Mead Data Central Corporation by the terms of which it licensed Mead to copy the aforementioned article, *inter alia*, and make it available to its subscribers for purposes of display, electronic performance and/or copying.

451. In so doing, the defendants Time Inc. Magazine Co. and Mead not only improperly trafficked in plaintiff's

work, but purported to appropriate to themselves the right to authorize others to copy, perform, display and/or distribute plaintiff's work.

452. After receiving the materials and/or information referred to in the preceding two paragraphs, the defendant Mead Data Central Corp. itself then either included plaintiff's article in an electronic database or placed the database in which plaintiff's article had already been included on-line so that it could be accessed by persons and/or entities subscribing to its service.

453. Since that time, plaintiff's article has been available on-line to members of the public or persons or entities using this service.

454. It has been accessed, displayed, downloaded and printed out on at least one occasion.

455. As recently as February 18, 1994, the article was still available on-line.

456. On information and belief, throughout the period plaintiff's articles have been on-line, defendant Mead has been promoting NEXIS as *the* database that truly affords subscribers access to full text.

457. By so advertising itself, defendant Mead has implicitly represented not only that plaintiff's article is on its database, *inter alia*, but also that its subscribers are authorized to access plaintiff's article, and publicly perform, display and/or copy it.

[62] 458. On information and belief, at least a portion of defendant Mead Data Central's income has derived from the perception that it can deliver full text.

459. Perceptions aside, neither Defendant Time Inc. nor defendant Mead Data Central has ever obtained plaintiff Whitford's consent to the inclusion of the article referred to in paragraph 445 in an electronic database, nor to the distribution, transmission and/or communication of an electronic copy of the article to members of the public. Nor has the plaintiff ever endowed either of the defendants with the authority to decide who can display, copy or perform plaintiff's work.

460. Further, neither of said defendants has compensated plaintiff Whitford for their electronic exploitation, usurpation and/or infringement of plaintiff's rights.

461. Notwithstanding these facts, on information and belief, the defendant Mead Data Central Corporation has received income and remitted royalties to the defendant Time Inc. Magazine Co. that derive from and/or are attributable to the infringement of plaintiff's rights.

462. The conduct complained of *inter alia* in paragraphs 449 to 460, above, has violated and continues to violate this plaintiff's exclusive rights under the copyright referred to in paragraph 445 above in that it interferes with plaintiff's exclusive right to reproduce or license reproduction of the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute or license distribution of copies of the copyrighted work, to publicly perform or

display the copyrighted work or license others to publicly perform or display the copyrighted work on electronic media, and to authorize all of the above.

463. Defendant Time Inc. Magazine Co. is not only liable for its own acts, but is also vicariously liable as a contributory infringer for the infringement effected by the defendant database service.

464. It has contributed to the infringement of plaintiff's rights by the database service in the following manner, *inter alia*: On information and belief, when Time Inc. Magazine Co. licensed defendant Mead Data Central Corporation to include the article set forth in paragraph 462 within its database and offer it to its subscribers for public display and/or electronic performance and copying, defendant Time Inc. Magazine Co. knew or had reason to know that defendant Mead Data Central Corporation planned to engage in conduct that would infringe plaintiff's copyright. Because Time Inc. Magazine Co. entered into a licensing arrangement with defendant Mead to allow public display of the infringed article and received royalties for such an arrangement, defendant Time Inc. Magazine Co. caused or materially contributed to the acts of [463] copyright infringement committed by Mead Data Central. As a consequence of these acts, Time Inc. Magazine Co. participated in, supervised and controlled the infringements committed by defendant Mead. As a further consequence, it is vicariously liable for those infringements.

465. As a consequence of the defendants' various infringements, plaintiff Whitford has suffered, and will

continue to suffer, economic losses and injury to his ownership in the aforementioned literary property.

* * *

[68] * * *

WHEREFORE, Plaintiffs pray for the following relief:

509. The issuance of a preliminary injunction enjoining defendants, and all other persons working in concert with them, from in any way copying, making a derivative work from, distributing, broadcasting, communicating or transmitting electronic copies of or otherwise electronically exploiting the articles heretofore mentioned.

510. The issuance of a permanent injunction enjoining Defendants, and all other persons working in concert with them, from in any way copying, making a derivative work from, distributing, broadcasting, communicating or transmitting [69] electronic copies of or otherwise electronically exploiting or authorizing others to exploit the articles heretofore mentioned.

511. The issuance of a declaratory judgement pursuant to 28 U.S.C. § 2201 declaring that the incorporation of plaintiffs' articles into an electronic database and the placement of their articles on CD-ROM without the authors' consent constituted copyright infringement within the meaning of the Copyright Act.

512. Judgment against defendants, jointly and severally, awarding to plaintiffs, *inter alia*, damages measured by the profits defendants derived from their unlawful infringement.

513. In those instances in which plaintiffs registered their copyright with the Registrar of Copyrights within three (3) months of publication, judgment against the defendants for statutory damages.

514. An award to plaintiffs of their costs and attorneys' fees incurred in this action.

515. Such other relief as the Court deems just and proper.

Dated: February 24, 1994
New York, New York

EMILY M. BASS, ESQ. (EB-2888)
330 Madison Avenue
14th Floor
New York, N.Y. 10017-5001
(212) 953-4300

Counsel for Plaintiffs

ANSWER TO AMENDED COMPLAINT, DATED MAY 6, 1994, pp. 1, 69-70

Bruce P. Keller, Esq. (BK 9300)
Jon P. Fine, Esq. (JF 1894)
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, BARBARA BELEJACK, MARY KAY BLAKELY, BARBARA GARSON, DANIEL LAZARE, MARGOT MIFFLIN, JOAN OLECK, SONIA JAFFE ROBBINS, LINDSY VAN GELDER, DAVID S. WHITFORD and H. BRUCE FRANKLIN

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY INC., TIME INC., THE ATLANTIC MONTHLY COMPANY, MEAD DATA CENTRAL and UNIVERSITY MICROFILMS INC.

Defendants.

ANSWER OF DEFENDANTS THE NEW YORK TIMES COMPANY, NEWSDAY INC., TIME INC., THE MEAD CORPORATION, AND UNIVERSITY MICROFILMS INC.

Answer to Amended Complaint

Defendants The New York Times Company, Newsday Inc., Time Inc., Mead Corporation ("Mead"), improperly named in the amended complaint as Mead Data Central Corp., and University Microfilms Inc. ("UMI") (collectively, ...

[69] * * *

FIRST AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the statutory rights granted pursuant to 17 U.S.C. § 201(c).

SECOND AFFIRMATIVE DEFENSE

The Defendants' alleged conduct is protected by the doctrine of fair use under the Copyright Act.

[70] THIRD AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the contractual agreements between the parties.

FOURTH AFFIRMATIVE DEFENSE

The plaintiffs' claims for relief fail to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the doctrine of waiver.

Answer to Amended Complaint

SIXTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the doctrine of estoppel.

SEVENTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

The plaintiffs' claims are barred by the statute of limitations.

* * * *

AFFIDAVIT OF EMILY BASS, ESQ., DATED MARCH 15, 1996 IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIV 8678(SS)

JONATHAN TASINI, et al.

Plaintiffs

– against –

THE NEW YORK TIMES CO.,
NEWSDAY, INC., et al.

Defendants

AFFIDAVIT OF EMILY BASS, ESQ. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

Emily Bass, Esq., being duly sworn, deposes and says:

That I am a member of the law firm of Burstein & Bass, counsel to the plaintiffs' in this matter. I submit this affidavit for the express purpose of setting before the Court the pleadings, depositions, affidavits, stipulations, admissions

and other documents, and the facts that derive therefrom, on the basis of which the plaintiffs in this matter are entitled to summary judgment on the issue of liability with respect to their copyright claims under Rule 56, Fed.R.Civ.P.

I myself prepared the Rule 3(g) statements that are also being submitted in connection with this motion and I have reviewed the averments in both the 3(g) statements and in this affidavit to assure myself — and have assured myself — that they are supported by materials that would be admissible in evidence.

Introductory Observations:

In its essence, this is a simple case. And if it were possible to make a supporting affidavit directly-on-line, the thick appendices and the dense paragraphs which follow could be omitted. The problem is we are constrained to talk about the way things work in a new technological environment using words only, not a colorful multimedia show. As well, unless we could all sit together and search a NEXIS database or a CD-ROM, we cannot demonstrate how many times the Plaintiffs' rights to be compensated for the product of their imagination and intelligence have been infringed.

Unfortunately, it takes longer to draw a clear picture on paper than it does with a mouse and a computer screen. Because Plaintiffs cannot "show," therefore, and have to "tell," they needed very detailed 3(g) Statements and because publisher Defendants have asserted confidentiality concerns, even among themselves, plaintiffs felt it was wise to prepare

three 3(g) Statements, laying out the circumstances affecting those publishers with great particularity. The instant affidavit represents a synthesis of those three statements. It aims to recite, in a coherent narrative, how by pretending to an identity of a medium that is counter to reality, defendants have wrongfully appropriated the plaintiffs' property and violated their obligations to the plaintiffs under the copyright laws of the United States.

A. *A JOURNEY THROUGH THE NEW TECHNOLOGIES*

Plaintiffs Write Their Articles

1. Plaintiffs are six freelance writers who make their living writing for a variety of newspapers and magazines. (Exh. 21 ¶¶ 1, 2, 3, 32; Exh. 22 ¶¶ 1, 2, 3, 27; Exh. 23 ¶¶ 1, 2, 3, 17). They wrote the articles that are the subject of this action for publication in *The New York Times*, *Newsday* and *Sports Illustrated*, respectively. (Works # 1 through 12 were written for *The New York Times*; works # 13 through 20, for *Newsday*, and work # 21, for *Sports Illustrated*. See chart below for title and author of each work.) (See Exh. 7 and 8 ¶¶ 31, 74, 246, 289, 367, 393, 419; Exh. 21 ¶¶ 4, 6, 9 and 27; Exh. 1). Each plaintiff was the sole author of his or her article for purposes of the Copyright Act and wrote the article on a freelance basis and not as a "work for hire." (Exh. 21 ¶¶ 1, 2, 4; Exh. 22 ¶ 4; Exh. 23 ¶ 4; Exh. 25).

Affidavit of Emily Bass

Each Article Is Included In A Collective Work, i.e., In An Issue Of The New York Times, Newsday or Sports Illustrated

2. Each article was then printed as part of a collective work — i.e., an issue of *The New York Times*, *Newsday* and/or *Sports Illustrated*. (See the fifth column of the chart for the dates on which they were published.) (Exh. 7 and 8 at ¶¶ 27, 70, 242, 285, 363, 389; Exh. 21 ¶¶ 4, 6, 9 and 27; Exh. 1).

		ARTICLES IN THE NEW YORK TIMES					
work	plaintiff-author	article	cause of action	pub date	article as appeared in periodical	article as appears when retrieved from NEXIS	article as appears when printed from NYTOD
1	Tasini	Can It Be Morning in Teamsterland?	1st&2nd ¶¶ 26-58	12/13/91	Exhibit 1	Exhibit 2	Exhibit 3
2	Mifflin	The Auteur Theory of Music Video Means No More Pretty Cliches	3rd & 4th ¶¶ 9-111	01/20/91	Exhibit 1	Exhibit 2	Exhibit 3
3	Mifflin	Down by the River	3rd & 4th ¶¶ 69-111	02/17/91	Exhibit 1	Exhibit 2	Exhibit 3
4	Mifflin	A Spectator in Morocco	3rd & 4th ¶¶ 69-111	04/07/91	Exhibit 1	Exhibit 2	Exhibit 3
5	Mifflin	England's Dreaming	3rd & 4th ¶¶ 69-111	04/26/92	Exhibit 1	Exhibit 2	Exhibit 3
6	Mifflin	They're Morocco Bound	3rd & 4th ¶¶ 69-111	11/22/92	Exhibit 1	Exhibit 2	Exhibit 3
7	Mifflin	A Little Ismael	3rd & 4th ¶¶ 69-111	05/16/93	Exhibit 1	Exhibit 2	Exhibit 3
8	Mifflin	Beyond Recognition	3rd & 4th ¶¶ 69-111	07/25/93	Exhibit 1	Exhibit 2	Exhibit 3
9	Mifflin	The Desert	3rd & 4th ¶¶ 69-111	10/31/93	Exhibit 1	Exhibit 2	Exhibit 3
10	Blakely	The Heart Is A Large Place	11th& 12th ¶¶ 241-283	04/29/90	Exhibit 1	Exhibit 2	Exhibit 3
11	Blakely	Who Did It? And What Does It All Mean?	11th&12th ¶¶ 241-283	09/02/90	Exhibit 1	Exhibit 2	Exhibit 3
12	Blakely	Remembering Jane	11th&12th ¶¶ 241-283	09/23/90	Exhibit 1	Exhibit 2	Exhibit 3

Affidavit of Emily Bass

		ARTICLES IN NEWSDAY					
work	plaintiff	article	cause of action	pub date	article as appeard in periodical	article as appears when retrieved from NEXIS	
13	Tasini	Say Adios to American Jobs	13th ¶¶ 284-309	10/26/92	Exhibit 1	Exhibit 2	
14	Tasini	A Union Boss' Labor Pains	13th ¶¶ 284-309	04/16/93	Exhibit 1	Exhibit 2	
15	Garson	Health Care vs Death Care	16th ¶¶ 362-387	11/12/91	Exhibit 1	Exhibit 2	
16	Garson	The Common Good is Swept Away by the 'Me Generation'	16th ¶¶ 362-387	11/24/91	Exhibit 1	Exhibit 2	
17	Garson	In 'JFK' We Feel the Pull of Our Lost Innocence	16th ¶¶ 362-387	01/10/92	Exhibit 1	Exhibit 2	
18	Garson	Networks That Serve the Unconnected	16th ¶¶ 362-387	06/28/92	Exhibit 1	Exhibit 2	
19	Whitford	Baseball: A Business, is Striking Out	17th ¶¶ 388-413	08/14/92	Exhibit 1	Exhibit 2	
20	Robbins	I Say Legal They Say Dirty	18th ¶¶ 414-439	06/17/91	Exhibit 1	Exhibit 2	

		ARTICLE IN SPORTS ILLUSTRATED					
work	plaintiff	article	cause of action	pub date	article as appeard in periodical	article as appears when retrieved from NEXIS	article as appears when printed from NYTOD
21	Whitford	Glory Amid Grief	19th ¶¶ 440-465	07/15/91	Exhibit 1	Exhibit 2	Exhibit 3

Production of The Newspaper Or Magazine

3. Plaintiffs submitted their articles, respectively, to *The New York Times*, *Newsday* and *Sports Illustrated* and those publications accepted plaintiffs' articles for publication. (Exh. 21 ¶¶ 5, 6; Exh. 22 ¶¶ 5, 6, Exh. 23 ¶¶ 7, 8). Employees at each of the defendant-publishers then keyed the text of plaintiffs' work into their ATEX computer word-processing system. (Exh. 28 ¶ 1, Exh. 29 ¶ 1, Exh. 30 ¶ 1). After each article was entered, other employees made formatting, lay-out and headline decisions, and entered coding for the lay-out and page placement decisions as part of the ATEX file. (Exh. 28 ¶ 2, 3; Exh. 29 ¶ 2, 3; Exh. 30 ¶ 2, 3).

4. Each file was then sent, together with files for other articles that were to appear in the same edition of the newspaper, through a process that inserted the necessary instructions or codes in each for the typesetter. (Exh. 28 ¶ 3; Exh. 30 ¶ 3; Exh. 29 ¶ 3). The files were then sent electronically to the typesetter, which printed the text of the articles in accordance with the codes embedded in the electronic files. (Exh. 28 ¶ 4; Exh. 29 ¶ 4; Exh. 30 ¶ 3, 7). The printed text was then cut and pasted, along with commercial advertising, photos and other graphics and other material, onto what are known as "mechanicals" — which resemble full pages of the publication, ready for photomechanical or electronic reproduction. (Id.)

5. In the case of The New York Times and Sports Illustrated, once they were in final form, digital images of the "mechanicals" were electronically sent to the publishers' printing plants. (Exh. 28 ¶ 6; Exh. 33 at 57-58; Exh. 30 ¶ 7). Equipment there received the digital images and produced negative images of each page. (Id.). The negatives were then used to produce the "plates" that were used to print the newspapers. (Id.)

6. In the case of Newsday, the "mechanicals" were photographed and negatives produced from the photographs. (Exh. 29 ¶ 6). As with The New York Times and Sports Illustrated, plates were then made from the negatives and the newspaper printed from the plates. (Id).

Affidavit of Emily Bass

The Publishers Hold The Copyright In the Collective Works

Plaintiffs Hold The Copyright in The Individual Articles

7. The publishers hold the copyright in these collective works.[1] See 17 U.S.C. 201(c) (Exh. 5 at NYT000292-320, N000096-101, T000005-6)[2]. Each of the plaintiffs still holds the copyright in his or her individual articles. Id.

8. The defendants registered the copyright in their collective works at or about the time the issues were published. (Exh. 21 ¶ 8; Exh. 21, table 6; Exh. 5 at NYT000319-320, NYT000315-316, NYT000309-310, NYT000294-302; Exh. 22 ¶ 8; Exh. 23 ¶ 6) Their registrations clearly note that the publishers are claiming copyright in a "collective work" and not in individual articles. (Exh. 5 at NYT000319-320, N000096-01). Plaintiffs

1. The Copyright Act defines the term "collective work" as a particular species of "compilation" . . . "such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 ("collective work"). It defines the term "compilation" to mean "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 ("compilation").

2. Not surprisingly, The New York Times recites that its newspaper is manufactured at its 43rd street offices *and printing plant*. (*See*, e.g. Exh. 5 at NYT000293, NYT000300, NYT000302).

registered their copyright in the individual articles they wrote prior to initiating this suit.[3] (Exh. 6)

The Publishers Discard The Collective Work, Encode The Individuals Articles That Were Collected to Include In The Work and Transmit The Articles To LEXIS/NEXIS.

9. In each instance, as soon as the magazine or newspaper was "closed," and a copy of the collective work had been transmitted to the printing plant or department, the publisher took steps, in effect, to dismantle the collective work.

The Publishers Ignore The Collective Works That They Have Just Created and, At Least Figuratively Speaking, Discard Everything But Their ATEX Text Files.

10. Even though the publishers had mechanicals for each of the pages that made up the collective work, negatives or film images of the collective works, and the plates that were used to print the collective works, none of these were saved

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3. Plaintiffs did so out an abundance of caution, even though they believe that they are entitled, as a matter of law, to claim the benefit of the copyright registrations effected by the publishers. *See* [cite relevant cases and regs.] They filed in their own right prior to bringing suit so that there would be no question but that they are entitled to the prima facie presumptions that are accorded certificates of registration.

for any length of time." (Exh. 28 ¶¶ 7, 8, and 9; Exh. 29 ¶¶ 7, 8, and 9; Exh. 30 ¶ 5-6).

11. Instead each publisher turned its attention back to its ATEX files — i.e., the text files it had prepared for sending to the typesetter — duplicated those files, and then took steps to convert the duplicate files into individualized *data* files that could be transmitted and/or delivered to Mead for incorporation into the NEXIS data base. (Exh. 28 ¶ 11; Exh. 29 ¶ 11; Exh. 30 ¶¶ 8 and 9).

12. By choosing *those* files as the files they would convert into data files for transmission to Mead, the publishers were necessarily making a decision *not* to send Mead photographs, graphics, advertising and certain other materials from their periodicals." Each of the three publisher defendants excluded

6. In the case of The New York Times, the mechanicals were preserved for approximately three (3) months, the negatives for approximately 30 to 40 days, and the plates "for a brief period." (Exh. 28 ¶¶ 7, 8, 9). In the case of Newsday, the mechanicals were preserved for approximately three (3) months, the negatives for approximately thirty days, and the plates were "discarded after a press run." (Exh. 29 ¶¶ 7, 8, 9). In the case of Sports Illustrated, the film, at least one plate, was retained for approximately 12 months and the printing plates were generally destroyed within 24 hours of use. (Exh. 31 ¶ 10).

5. That is, prior to sending text to the composing room, where text and graphics were merged. Each ATEX file contained the text of one article and a set of typesetting commands.

6. This is commonly so since the ATEX files contained materials that had not yet gone to the composing room. It was in the place after the final preparation of the ATEX files, i.e., in the composing room, that text and graphics were merged. (Exh. 33 at 19, 31; Exh. 35 at 34-36).

essentially the same material from the materials they sent Mead. (See, e.g., Exh. 33 at 31, 39, 41 (NYT didn't send Mead any graphic material, advertisements, crosswords, photographs, etc.); Exh. 35 at 14, 30, 41 (Newsday didn't sent Mead any graphics, photographs, ad copy, sports statistics, weather reports, sports results, etc.); Exh. 32 at 15, 16 (SI didn't send Mead photographs, advertising copy, the cover of the magazine, etc.); Exh. 22 ¶ 55 (in addition, Newsday does not send Mead legal notices, weather forecasts, and death notices); Exh. 38 at M003645, M003653-54 (in addition, NYT didn't send Mead illustrations, graphs, stock listings, formatting instructions, all material appearing in very tiny 'agate' type, weather, sports, corrections to stories appearing in previous editions, references to related stories or photographs, jump-lines); Exh. 23 ¶ 23 (SI didn't sent Mead the Table of Contents to the magazine); Exh. 41 at T000019, Schedule A (in addition, SI didn't send Mead, "such portions of the materials which Licensor does not have the right to include in Licensor's materials," drawings, maps, charts, tabular data, cartoons, subscriptions rates, volume numbers, masthead materials, mathematical formulas and equations, any materials from special issues of the publication, etc.). (Exh. 38 at NYT000213, M003684; Exh. 39 at U007359; Exh. 40 at N000063, M003719; Exh. 41 at T000019; Exh. 49 at M002018).

Each Publisher Then Encoded Its Text Files, Chose Appropriate Terms To Index To Them And Transmitted Them to Mead.

13. Towards this end,

• it stripped the ATEX files of formatting codes and/or instructions, including typesetting commands, particular to the

layout and composition of the newspaper and/or magazine[7] (Exh. 21 ¶ 91; Exh. 33 at 29-30; Exh. 35 at 38; Exh. 32 at 23; Exh. 30 ¶ 8);

- it then "reconciled" the contents of the remaining ASCII file with the contents of the corresponding article as it "appear[ed] in the printed, final edition of the newspaper," (See, e.g., Exh. 33 at 21; Exh. 35 at 6; Exh. 32 at 6, 8);

- it stitched together information from various electronic files so that the text of an article and its headline, byline and title would all be together in one file (See, e.g., Exh. 35 at 13; Exh. 33 at 22, 27; Exhibit 32 at 21);

- it then added a code or codes to identify where the body of the article began and ended (See, e.g., Exh. 33 at 23; Exh. 41 at T000023);

- it added codes to identify where the headline of the article began and ended (See, e.g., Exh. 33 at 23; Exh. 35 at 17; Exh. 32 at 20; Exh. 30 ¶ 8; Exh. 41 at T000023);

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7. In other words, it stripped the ATEX files of the codes and instructions that had been inserted so as to enable the text of an individual article to be printed as part of the collective work.

For example, it would have stripped codes relating to font size, to the placement of photographs and/or graphics, to the placement of one article in relation to another or in relation to the rest of the page, to the placement of articles in relation to photographs and/or graphics, and/or to the location of banner headlines and/or other headlines in relation to the articles appearing on a page.

• it added codes to identify where the byline for the article began and ended (See, e.g., Exh. 33 at 23; Exh. 35 at 17; Exh. 32 at 20; Exh. 30 ¶ 8; Exh. 41 at T000023);

• it entered information into the file to identify the section of the paper in which the article had originally appeared, and, where a header field was not already indicated, added codes to identify where this electronic entry began and ended (See, e.g., Exh. 33 at 24; Exh. 22 ¶ 56; Exh. 30 ¶ 8; Exh. 41 at T000022);

• it entered information into the file to identify the page in the paper or periodical on which the article had first appeared (see, e.g., Exh. 33 at 24; Exh. 32 at 20-24), and deleted other information (such as a "jump-line") that notified readers of subsequent pages of the paper on which the article had been continued (see, e.g., Exh. 35 at 16; Exh. 33 at 24; Exh. 41 at T000022);

• it entered information to identify the edition of the paper in which the article had appeared (see, e.g., Exh. 33 at 23; Exh. 22 ¶ 56; Exh. 30 ¶ 8);

• it added a word or words to describe the nature of the article (e.g., letter to the editor, op-ed piece, series piece, analysis, book review, etc.) and codes to identify where this descriptive word, phrase or "segment" began and ended (See, e.g., Exh. 33 at 25, 29);

• it added "key words" or indexing terms to the file or created those terms and selected appropriate key words for

subsequent association with the file (See, e.g., Exh. 35 at 6, 15, 17, 18; Exh. 29 ¶ 11; Exh. 41 at T000022)[8]; and

- once the coding or tagging was complete, a separate "accession number" or "filename" was assigned to each file or article (See, e.g., Exh. 33 at 26 (number); Exh. 35 at 25 (number); Exh. 30 ¶ 9 (filename)[9]).

14. Each of these steps was taken for the express purpose of so electronically configuring and marking the files (i.e., articles) that, after being added to the NEXIS' data base, they could be searched for and retrieved by NEXIS'

8. Although the New York Times, like Newsday, prepared abstracts for many of the articles and decided upon appropriate terms to be indexed to the articles, it did not insert the abstracts and the indexing terms into the individual files for each article before sending them to Mead. It sent the abstracts and indexing terms to Mead in a separate transmission. (*See generally* Exh. 33 at 25, 32, 46-47 for a description of the abstracting and indexing operation). This transmission took place daily between 8:00 and 11:00 p.m. (Exh. 33 at 46). It took place at this hour and not earlier, and not together with transmission of the articles, because it takes the indexing group an entire day to finish its work. They work from 8:00 a.m. on average to 6:30, 7:00 p.m. every day. (Exh. 33 at 46, 47).

When Mead receives the abstracts and indexing terms, it incorporates them into the individual files to which they pertain. (Exh. 34 at 48, 49).

9. The name consisted of a unique filename followed by a dot and then the date of the issue of collective work in which the article had appeared. (Exh. 30 ¶ 9). *E.g.*, assuming an article on badgers had appeared in the February 26, 1991 issue of *Sports Illustrated*, it might be named "badgers.226".

customers — *as individual articles* — by headline, name of author, type of piece (i.e., op-ed, series piece, bio, etc.), periodical, date, names of companies that appeared in the article, names of persons that appeared in the article, key words, basic topics or themes, etc. (Defendants' 3(g) Statement at ¶¶ 29 and 32 (wherein the defendants have admitted that the codes that plaintiffs are talking about "have been added for indexing and search purposes"); Exh. 33 at 23; Exh. 21 ¶¶ 76, 78, 79; Exh. 28 ¶ 11; Exh. 29 ¶ 11).

15. In the case of the New York Times and Newsday, after the files received their accession numbers, they were sent to a temporary storage area on a computer. (Exh. 35 at 19, 22, 63-65; Exh. 33 at 34-35). At an appointed hour each day, all of the files in temporary storage were transmitted to Mead. (Exh. 35 at 65 (Newsday: 2:00 a.m.); Exh. 33 at 38, 39 (NYT: 3:00 or 4:00 p.m.).[10] The electronic transmission took place virtually automatically. (Exh. 35 at 11, 12, 19, 22, 33; Exh. 33 at 35). No significant human intervention was needed. (Exh. 35 at 68-70; Exh. 33 at 35[11]).

16. In the case of Sports Illustrated, the data files were not transmitted to Mead. They were copied, in batches, to

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10. In the case of both The New York Times and Newsday, the articles were sent to Mead within twenty-four hours of their publication. (Exh. 21 ¶ 18, Exh. 22 ¶ 22). In the case of Sports Illustrated, tapes containing the articles were delivered to Mead within forty-five (45) days of the articles' publication. (Exh. 23 ¶ 9).

11. At the Times, a person "checks off the appropriate line" in the transmission menu on a computer screen to initiate transmission. "[T]hat's basically the end of the human involvement." (Exh. 33 at 35).

magnetic tapes, and then the tapes were delivered to Mead. The delivery occurred once a week. (Exh. 30 ¶ 9).

17. Like the process of transmitting files to Mead, the process of writing the data files to tape was automatic. The Time Inc. "systems engineers did not view the contents of the files" they were copying. Their responsibility was simply "to copy the files to tape and confirm that they had the correct number of files as stated by the library staff." (Exh. 30 ¶ 10).[12]

18. As a consequence of these procedures, Mead got all of the articles that had appeared in one day's edition of The New York Times[13] or one day's edition of Newsday or one week's edition of Sports Illustrated at the same time.[14] (Exh. 33 at 35;

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12. It was also their responsibility to create a directory of the files that were being written to each tape and to label each tape with the name of the magazine, date of the issue in which the articles had appeared, number of files on the tape, and the date and their initials. (Exh. 30 ¶ 9).

13. This would appear to be the most efficient way for a publisher to send Mead all of its articles and for Mead to verify that it has received the publisher's articles. For, if there were any discrepancy in the number of articles being sent and received on any given day, it would be a fairly easy matter for the publisher and Mead to compare accession numbers and/or filenames to ascertain precisely which articles had not in fact been transmitted (or been properly transmitted).

14. The defendants will undoubtedly attempt to make much of this fact, although the fact is of no significance. The mere fact that data files are transmitted at the same time or that, for convenience, they have been included in the same transmission does not mean that they are *being transmitted as part of a collective work.*

(Cont'd)

Exh. 35 at 22, 40, 65; Exh. 32 at 30; Exh. 21 ¶ 18; Exh. 22 ¶ 22; Exh. 23 ¶ 9).

19. They did so, however, only at the end of the day or early the next morning (i.e., on the day following the day of publication) since it took substantially an entire day to ready the files for transmission. (Exh. 33 at 38, 39 (it generally took from approximately 7:00 or 8:00 am to 3:00 or 4:00 p.m. to prepare the text of the articles and "segments" for transmission, and from 7:00 a.m. or so until 11:00 p.m. or so to prepare the key words and indexing terms); Exh. 35 at 19 (transmission of articles from Newsday was not effected until 2:00 a.m. the following day); Exh. 35 at 18 (it took three to ten minutes to ready each article). Each publication had a department or designated group of employees dedicated to the encoding and segmentation functions. (Exh. 33 at 32, 38, 39; Exh. 32 at 20-24) They also had a department or group of employees dedicated to "indexing." (See, e.g., Exh. 33 at 32 (department of 15 people)).

(Cont'd)

It should be clear given all the effort, energy and expense to which the publishers have gone to ensure that there is only *one* article per electronic file and that each electronic file is a distinct unit that can be *separately* searched for and retrieved that the data files that are being sent are *not* intended to be treated as a collective whole, either by NEXIS or, even more significantly, its customers.

Affidavit of Emily Bass

Mead Adds Additional Coding to the Files, Selects Term Topic Identifiers, and Updates the Files To Its Data Base

20. When Mead receives data files from any of the three defendant-publishers, the files are subjected to a variety of processes so that they can be incorporated into the NEXIS data base and accessed by customers. (Exh. 34 at 36-60).

The Conversion Program

21. The first program to which data files are subjected is the "conversion" program. It converts the codes each of the publishers uses into codes NEXIS uses and can interpret. (Exh. 34 at 39). During this conversion process, each article is given a NEXIS code to identify its headline, byline, the section of the newspaper in which the article originally appeared, a code identifying where in the data the body of the article begins, and a NEXIS accession number. (Exh. 34 at 40; Exh. 49 at M002004-002021).

The "Off-Line" Editor

22. Next the data files are put through an "off-line editor." It formats the data in a file, adds segments to the file (i.e., regarding the word count of the article involved and the alleged identity of its copyright owner), and "concatenates" any information that was separately transmitted so that it will be displayed together with the article. (Exh. 34 at 44, 45).

Affidavit of Emily Bass

Indexing

23. The data is then "indexed." It is put through a software program (1) that matches "key terms" it finds in its thesaurus with words that appear in the article, and (2) that adds indexing terms to the article or links them in some way. (Exh. 34 at 44, 45). Some of these indexing terms are supplied by the publishers. (Exh. 34 at 48). Others originate with and are added by Mead. (Id.; Exh. 49 at M002004-002021). Among the terms that Mead adds are company names and stock exchange ticker symbols. (Exh. 34 at 51).

The Term Topic Identifier Program

24. Next, Mead runs the articles it has received from the publishers through "another software program that looks at key terms, key topics within the data." (Exh. 34 at 50). This process is known as the "Term Topic Identifier" process or "TTI." (Id.) If an article is found to contain certain terms, then a code identifying a general topic (e.g., "Gulf war," "Abortion," "Riots and Demonstrations") is added to the file that corresponds with that article. (Exh. 34 at 50-51).

The Identification of a "Searchable Lead"

25. In some instances, the data files are then put through yet another software program that enables Mead to identify the portion of an article that will constitute its "searchable lead." (Exh. 34 at 63). If a NEXIS' subscriber chooses this display option, instead of viewing an entire story, he or she will only have to see and review the initial portion of an article — generally, the first paragraph or so — to ascertain

whether or not it is of interest to him or her. In addition to viewing the lead paragraph or so, the subscriber will also see certain basic "side information" regarding the article. (Exh. 34 at 64).[15]

NEXIS Adds "Accession Numbers" That Are Unique to Each File or Article

26. After the reconciliation, conversion and coding routines have been completed, NEXIS assigns an accession number to each file. (Exh. 34 at 33). Each file receives a unique number. (Id.)

The Data is Then "Updated" To the Data Base and "Promoted" to NEXIS' Customers

27. The data files are finally ready to be "updated" or added to NEXIS' data base. (Exh. 34 at 66-68). This is accomplished in four stages: First a duplicate is made of the existing data base. (We shall call the existing data base "Generation 100," and its duplicate, "Copy "C" of Generation 100"). The latest batch of data files to be processed are then added to "Copy C" to make a "new generation" of data base. (We shall call this data base "Generation 101"). (Exh. 34 at 67-68). The public, i.e., NEXIS' customers, are then given access to Generation 101 or, in NEXIS-ese, the new generation is "promoted to" the public. (Exh. 34 at 68). Finally, the old generation of data base ("Generation 100")

15. In the case of The New York Times, the periodical itself decides the portion of the story that NEXIS will designate as "the lead." (Exh. 34 at 65). In the case of Newsday, NEXIS, and not Newsday, defines and creates the "searchable lead." (Exh. 34 at 66).

is destroyed as soon as it is confirmed that the data files in the new generation are available on-line. (Exh. 34 at 69).

NEXIS Customers Log On, Key In And Search Out and Retrieve Individual Files

28. NEXIS customers enter NEXIS by using a telecommunications package that permits them to access LEXIS/NEXIS' mainframe computers. (Exh. 34 at 118). Once a NEXIS customer has accessed NEXIS via a telecommunications program, he or she accesses particular data by asking NEXIS to perform a search for him or her. (Exh. 34 at 122). Unless he chose a pre-packaged or "pre-run search,"[16] he would be likely to ask NEXIS to conduct a *conjunctive* or "Boolean" search for him. (Exh. 21 ¶ 132; Exh. 22 ¶ 70). In such a case, he would choose a series of "search words" and juxtapose them in such a fashion as to define a set of documents that would likely pertain to the topic or topics of interest to him.

29. For example, let us assume that our mythical NEXIS customer is a student who has an abiding interest in archaeological digs. Let us also assume that he has free access to NEXIS through his college and uses it to keep abreast of recent "finds." He might fashion a search along the following lines:

> ARCHEOLOG! w/2 (DIG! OR EXCAVATION!) AND (FIND! OR DISCOVER!) AND DATE AFT 1991

16. Assuming that LEXIS/NEXIS creates pre-packaged searches that might be expected to appeal to individuals and/or students researching current events, one example of a pre-packaged search might be something like "President Clinton and Health Care Reform."

30. Or, let us assume that our mythical NEXIS customer is a businesswoman who is looking for information about telecommunication companies' entry into the cable-tv market, as is allowed by the recently enacted federal telecommunications act. She might fashion a search such as:

> TELECOMS OR BABY BELLS w/25 CABLE TV AND DATE AFT 1995

31. Depending upon the library and/or group file the customer selects, he or she will be able to access data from *a number* of periodicals or will find himself limited to data from one periodical. (Exh. 34 at 22-23, 27-30, 127-28).

32. In either case, what our customer will come up with when his or her search is conducted is a number of *articles* from those periodicals that contain the "search words" that he asked NEXIS to find and not the *entire issues* of those periodicals. (Exh. 34 at 131-132).

33. Let's return to our examples. NEXIS would tell our student that his search had produced 776 stories and our businesswoman that her search had produced 123 stories.

34. Each of them then has an option. They can display the results of their searches in a number of formats. If our businesswoman chooses the "cite" format, she will get a display like the following:[17]

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17. Obviously, these are only the first few items that would be displayed.

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1. New Straits Times, March 7, 1996, Internet world Asia; Pg. 34, 1123 words, The impact and major trends in Asia

2. The Atlanta Journal and Constitution, March 5, 1996, Tuesday, ALL EDITIONS, 431 words, BellSouth set to test wired/wireless package, Michael E. Kanell; STAFF WRITER

3. Financial Times, March 4, 1996, Monday, Pg. 10, 300 words, People, By CHRISTOPHER PARKES, LOS ANGELES

4. The Boston Globe, March 3, 1996, Sunday, City Edition, ECONOMY; Pg. 78, 1194 words, Highlights of the week; Feb. 25-March 2; West comes East; BUSINESS REVIEW

5. Rocky Mountain News, March 3, 1996, Sunday, BUSINESS; Ed. F; Pg. 65A, 1254 words, Baby Bells place bets on the future Long distance firms get into cable, cellular, Kerri S. Smith; Rocky Mountain News Staff Writer

6. St. Petersburg Times, March 3, 1996, Sunday, O South Pinellas Edition, NATIONAL; THE CANADA REPORT; Pg. 11A, 698 words, Ontario premier to enact budget cuts, strike or no, JIM FOX

7. Sunday Times, March 3, 1996, Sunday, Business, US phone giants branch out, Garth Alexander in New York

8. Financial Times, March 2, 1996, Saturday, UK Company News; Pg. 8, 858 words, Walking a high wire at Energis — The choices facing the National Grid's telecoms arm, By ALAN CANE

35. Obviously, some of these articles will pertain to what our hypothetical businesswoman is interested in, and some will *not* be on point.

36. If she wants to see the actual *text* of any of her "hits" in order to ascertain whether they are or aren't pertinent, she must decide how much of the text she wants to look over. She can choose just to see the "searchable lead" of the article, in which case she would choose the "lead format." (Exh. 34 at 123-125). She can choose to see the specific portions of the article in which the search items appear, in which case she would choose the "kwik" or "variable kwik" format. (Exh. 34 at 125). Or, she can choose to see the entire text of an article, in which case she would choose the "full format." (Exh. 34 at 128-130).

37. In the latter instance, i.e., if she decides that she wants to see the full text of an article, she can do either of two things: Either she can go to a specific "hit" (i.e., article) on her list of 123 citations and choose to see that article in full format. (After reviewing it, she can then go back to the list and, referring to the cites, choose to retrieve and display any other article on the list.) Or she could, by choosing the "full format," choose to see any particular article on the list and then, by clicking the button on her screen that allows her to retrieve and display the "next document," she can retrieve and display each subsequent article on the list, in turn. (Exh. 34. 127-128; Exh. 49 at M002846, M002712).

38. Whichever of these formats and/or options she chooses, the *most* that she would be able to display on her screen at any one time would be the full text of *one* article, together with the segments and indexing terms that accompany that article. (Exh. 34 at 125-26, 132). There would be no way for her to simultaneously display the text of all of her "hits" at one time, *or*, indeed, to display the text of *other* articles that had appeared together with the "hit" article in the same newspaper or magazine issue. (Exh. 34 at 132, Exh. 15 at 10-11).

39. Moreover, there is only *one* search that a customer could run that would even designate all of the articles that appeared together in one issue of a newspaper or magazine as "hits" and display their "cites" together in one list: that would be a search in which the *only* search terms the NEXIS subscriber used were "name of publication" and "date" and in which the *only* date that he or she entered for the search was the date of one particular issue. Since Mead has provided for a myriad — indeed, almost infinite — number of *other* search possibilities, however — and the publishers have marked, indexed and encoded their files so as to provide for those other possibilities — it is clear that it was contemplated and intended that in most instances customers would be searching for, retrieving and displaying individual articles "without also retrieving other articles . . . [that] appeared together with the retrieved article in the print edition of a publication."[18]. (Exh. 22 ¶ 13; Exh. 23 ¶ 57; *see also*

18. If it were true, as the defendants contend, that NEXIS were simply an electronic "library of periodicals" in which it was contemplated that only whole *issues* of a newspaper or magazine

(Cont'd)

Exh. 34 at 130; Exh. 21 ¶ 11; Exh. 22 ¶ 11; Exh. 23 ¶ 25). Indeed, the fact that both the publishers and Mead assign individual 'accession numbers' to *articles*, and *not* to editions or issues, reflects the fact that it is *the article*, and not the issue or edition of a publication, *that is the basic unit of the data base.*[19] (Exh. 34 at 33; Exh. 23 ¶¶ 54, 55, 57; Exh. 33 at 21-22; Exh. 35 at 25; Exh. 35 at 12 (Newsday treats each story as a separate file); Exh. 49 at M003822-3833).

40. Since Plaintiffs' works have been placed on-line, they are available to be accessed, retrieved, displayed and/or printed out as individual articles separate and apart from other articles that appeared together with them in *The New York Times*, *Newsday* and/or *Sports Illustrated*. (Exh. 2; Exh. 21 ¶ 11; Exh. 22 ¶ 11; Exh. 23 ¶ 25.) They have been available in this fashion apparently since approximately twenty-four hours after their appearance in print, in the case of *The New York Times* and *Newsday*, and within forty five days in the case of *Sports Illustrated*. (Exh. 21 ¶ 18, Exh. 22 ¶ 22, Exh. 23 ¶ 9).

(Cont'd)

would be accessed, retrieved and displayed, then the only "segments" that Mead and the publishers would have provided for would have been the "periodical" and "date" segments, and they would not have provided for any other segments or for any search terms, key words and indexing terms that for utilization in Boolean searching.

19. This point is also underscored by the fact that when an article has been accidentally segmented or fragmented and portions of it appear in different electronic files, those files are "stitched" together, and by the further fact, that where the headline and/or byline for an article appears originally in a separate file, the files containing the headline and byline and the file containing the text of the article are "stitched" together.

41. As a consequence, a customer who subscribes to NEXIS and secures the appropriate telecommunications package can display Plaintiffs' works on his or her personal computer. (Exh. 1; Exh 21 ¶ 11; Exh. 22 ¶ 11; Exh. 23 ¶ 25; Exh. 34 at 118-119.) If he has the appropriate software and the proper equipment, he can also download electronic versions of Plaintiffs' works to his or her hard drive or to a floppy disk for subsequent retrieval and printing. (Id.; *see also* Exh. 34 at 120; Exh. 15 ¶ 42). If he downloads one or more of the works, he can subsequently display, edit and/or modify the works he has downloaded, or reproduce them in whole or in part, either as retrieved from NEXIS or as modified, with or without attribution to Plaintiffs. (Id.) This is made particularly easy by the fact that there is no acknowledgment of the authors' copyright in the article. (Exh. 1; Exh. 21 ¶ 11; Exh. 22 ¶ 11; Exh. 23 ¶ 25).

42. The articles that are displayed, downloaded and/or printed out will bear copyrights both in The New York Times' and Mead's names. (Exh. 2).

The Next Step in The Journey: Mead Provides The Data to UMI For Processing and Incorporation Into Its Text-Only CD-ROMS

43. Pursuant to a three-way agreement between The New York Times, Mead and UMI, Mead provides the same data to UMI that it places on NEXIS. (Exh. 34 at 136). It does so with The New York Times' knowledge and consent and for the specific purpose of enabling UMI, after processing the data files it receives, to incorporate them into its CD-ROM products. (Exh. 21 ¶¶ 21-22,40; Exh. 39 at U006910-U006914; Exh. 8 ¶¶ 55, 56, 98, 99, 270, 271). Mead provides the data to UMI -on tape. (Exh. 34 at 136).

44. In addition to containing the text of articles, the 9-track machine-readable magnetic tape that is delivered to UMI contains codes that are particular to NEXIS. (Exh. 31 at 18-21). As Mead did when it received information from the publishers, therefore, UMI processes the data it receives from Mead through a "conversion" routine. (Exh. 31 at 24-25, 28, 29, 35). The conversion routine strips out the codes that are specific to NEXIS' programs or equipment and that have "no meaning" to UMI. (Exh. 31 at 36, 37). The Mead codes that do have a meaning to UMI are replaced with UMI codes that UMI's system will be able to understand and interpret. (Exh. 31 at 25, 26, 28, 29, 35). The codes that are added are added to facilitate Boolean searching. (Exh. 31 at 50).

45. In addition to adding codes or marking to the data files, the parties' CD-ROM License Agreement also contemplates that UMI will "include Times indexing terms" on its CD-ROMs so as to make the data on them "full text searchable." (Exh. 49 at M011427-011436, especially M011428; Exh. 39 at NYT000003; Exh. 21 ¶ 77). Following "all the processing" involved in converting the data on the tape that UMI receives from NEXIS into a format that is readable by UMI and after adding whatever additional coding and/or index terms it wishes to, UMI creates a second tape with all of this information on it. The second tape contains a "representation of the data in electronic form as to how it is to appear on the CD for our system" (Exh. 31 at 45). A "negative" is then made of this tape. The resulting mold, which is made out of glass, is used to stamp out the CD's. (Exh. 31 at 46).

46. In the case of NEW YORK TIMES ON DISC, each CD-ROM disk contains the "full-text" of articles that appeared in The New York Times over the course of one or more years.[20] (Exh. 31 at 14-15). Each article that appeared in the Times is placed on NEW YORK TIMES ON DISC as an individual unit with its own "accession number." (Exh. 31 at 81-82). In addition to containing the full text of these articles, a "NEW YORK TIMES ON DISC" disk contains software and an electronic index that enables the customer to search the data on the CD-ROM. (Exh. 31 at 46-48).

47. In effect, then, the CD-ROM is "actually a medium" that contains two different types of "electronic products:" (1) an electronically coded version of the information originally contained in an article appearing in a publication, and (2) electronic codes controlling the operation of the CD-medium, which make the textual information accessible to the user. (Exh. 31 at 7-8). It is the "collections of information" plus the electronic "controls" that is marketed by UMI as the "CD-ROM" product. (Exh. 31 at 7-8).

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20. Like NEXIS, the "NEW YORK TIMES ON DISC" CD-ROM does not contain any of the graphic elements that appeared in the Times (e.g., photographs, drawings, maps, etc.), nor any advertisements, crosswords, paid death-notices or weather reports, etc. (Exh. 31 at 66).

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UMI's Customers Effectively Have The Same Options With "NY TIMES ON DISC" As They Have With NEXIS: To Retrieve and Display Individual Articles.

48. The "New York Times On DISC" customer has two options: to perform a Boolean search or a pre-run topic search. (Exh. 31 at 47-50). If he performs a Boolean search, he can search by name, title, author, subject of the article, company names, article type and keywords. (Exh. 21 ¶ 110). If his search is a successful one, the display at the UMI workstation,[21] where "New York Times On Disc" disks are designed to be used, will tell him how many "occurrences" of the search terms he selected were found among the data files on the CD. (Exh. 31 at 53). Each "occurrence" will correspond with *an article* from The New York Times, and not an entire issue or edition. (Exh. 31 at 53). In other words, each New York Times On Disc "occurrence" is equivalent to a NEXIS "hit."

49. If the CD-ROM user chooses to view an "occurrence," the CD-ROM will make the article available for viewing by *itself*, independent of other articles and of graphics that appeared with it when the article appeared in print. (Exh. 15 ¶ 29). As a consequence, what the CD-ROM user will be retrieving and viewing will *not* be a complete edition of *The New York Times*, but only single articles. (Exh. 31 at 54). In all likelihood these individual articles will have appeared on *different* dates and in *different* issues of *The New York Times*.

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21. UMI workstations utilize a program known as "PRO-QUEST." (Exh. 31 at 8-9; Exh. 3).

50. Since New York Times On Disc is a full-text information service and has contained articles from 1990 forward since on or about its inception, all of the articles Plaintiffs' wrote for The New York Times are available on New York Times On Disc. (Exh. 3; Exh. 21 ¶ 12). They have been available on it since sometime in 1992. (Exh. 21 ¶ 21). Assuming he or she has the proper hardware, therefore, a customer who purchases or uses UMI's New York Times On Disc product can access, display and print-out copies of Plaintiffs' works, namely works #'s "1" through "12." (Exh. 2; Exh. 21 ¶ 12, Exh. 34 at 120, 130; Exh. 31 at 80). In each instance, while the Plaintiff's name will appear in the by-line segment, there will not be any acknowledgment of the author's copyright in the article. (Exh. 2). What will appear is (1) a notice of copyright by The New York Times, (2) a notice of copyright by UMI, and an acknowledgment that "Data supplied by NEXIS® Service." (Exh. 2; Exh. 39 at U6909-6914).

In Addition To Their Inclusion in New York Times On Disc, Certain of Plaintiffs' Works Have Also Been Included in UMI's New Image Product, "General Periodicals On Disc"

51. All of Plaintiff Mifflin's and Blakely's articles[22] can be viewed in the "General Periodicals On Disc" data base as well as in the "New York Times On Disc" data base. (Exh. 50 at U007080-7081). General Periodicals On Disc is an "image product CD-ROM" that includes articles that were originally published in The New York Times Book Review,

22. We are referring, here, to works #'s 2 through 9 for Mifflin and 10 through 12 for Blakely. (*See supra* at 2-3).

the Sunday Magazine section, and non-New York Times publications. (Exh. 31 at p. 66, 67).

52. Just as "General Periodicals On Disc" is not limited in terms of what it includes to materials from *The New York Times*, it does not give the user access to the entire contents, not even the full-text, of any *single* issue or edition of *The New York Times*. (Exh. 31 at 12, 15, 65). Using "General Periodicals On Disc," it is impossible to view news articles published in the same Sunday edition in which the Book Review originally appeared, because the rest of the paper (with the exception of the Sunday Magazine) is not included on that disk. (Exh. 31 at 12, 15, 65).

53. Unlike the "New York Times On Disc" CD-ROM, the "General Periodicals On Disc" CD-product is created by means of an electronic microform duplication process. (Exh. 31 at 68). The New York Times delivers copies of its Sunday Book Review and Sunday Magazine sections to UMI and UMI takes photographs of each printed page of these sections. (Exh. 31 at 66-68). These photographs are then electronically "scanned" and converted into electronic images. (Exh. 31 at 68).

54. Once the pages of the 200 or so periodicals whose material is represented in General Periodicals On Disc (hereinafter "GPOD") have been electronically scanned and converted into electronic images, "the electronically scanned images" are then "link[ed] . . . to an index and abstract database on compact disc." (Exh. 50 at U007550). Someone using GPOD at a ProQuest workstation will then access information in it "by searching the ASCII full-text and/or

the index" on the disk. (Exh. 50 at U007320). When they have reviewed their search results and identified a series of cites or articles that are of interest to them, they can direct the ProQuest station to cause those articles to be printed out. (Exh. 31 at 85, 107-108). What will be printed out is *not* that text that has been located in the index or ASCII text, but the "images" from the image data base that have been linked to the ASCII text. These images are of the full pages of the periodical or magazine in which the "hit" articles appeared. (Exh. 4).

55. Unlike the "text-only" CD-ROMS, e.g., "New York Times On Disc," the "image products" do not permit of full Boolean searching. (Exh. 31 at 73).

A Parallel Journey Through The Labyrinthine Passages Of The Publisher-Defendant/Data Base Defendant Contracts.

The Defendants Prepare For a New Era: They Enter Into a Series of Contracts That Divide Up The Technological Universe.

The New York Times' Contracts with The Data Base Defendants:

The "Mead License"

56. In 1983, The New York Times entered the era of commercial on-line information services. In this connection, it executed two separate, but related, "License Agreements" to provide third-parties with materials from *The New York*

Times.[23] (Exh. 38 M003642-M003698; Exh. 39 at U007357-U007436; Exh. 21 ¶ 83.) The first was a "License Agreement" with "Copyright License", dated January 31, 1983, between The New York Times Company and The New York Times Information Service (hereinafter referred to as "Mead").[24] (Exh. 38 at M003642-M003698 (agreement); Exh. 38 at M003699-M003704 (license); Exh. 39 at U007428-007436 (license); Exh. 21 ¶¶ 83, 84.) The second, dated April 5, 1983, was between The New York Times Company, Microfilming Corporation of America (a wholly owned subsidiary of The New York Times), and Xerox Corporation (of which UMI was "a unit").[25] (Exh. 39 at U007399, U007357-007399 ("License Agreement").)

57. In the first Agreement and Copyright License, The New York Times granted Mead "as against all persons including The Times" . . . "an exclusive worldwide copyright license" to sell and display, publicly or privately, directly or through distribution sublicenses, by means of *computerized coded* storage and computerized *electronic coded* retrieval

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23. It has been the defendants' position that these two agreements were in force and effect during the period relevant to the Complaint and that any earlier agreements, if they existed, would be irrelevant. No earlier agreements were produced in discovery. (Exh. 38 at M003642-M003698; Exh. 39 at U007357-U007436).

24. Mead subsequently inherited this contract from NYTIS. (Exh. 45 at NYT000217-NYT000192, NYT000192-216; Exh. 33 at 5-24). "LEXIS/NEXIS" is Mead's successor. UMI is Bell & Howell's successor.

25. UMI subsequently succeeded to this contract in its own right. (Exh. 39 at U007357-7436, NYT000002-11).

systems to which customers obtain access through terminals, *all and any portion of* the material set forth in Exhibit A (the "Licensed Times Material"); provided that this grant of rights as to Licensed Times Material published after January 31, 1983 shall not be effective until 12:01 AM on the day after publication date of the issue of The New York Times containing such Licensed Times Material. (Exh. 38 at M003689-90)

58. Exhibit A defined "Licensed Times Material" to include *inter alia*

> all . . . future sections and editions (including regional and national editions) of *The New York Times*, . . . excepting therefrom photographs, crossword puzzles, other graphic material and advertisements. (Exh. 38 at M003694).

(Exh. 38 at M003642, M003645; Exh. 39 at U007428, U007436 (emphasis added.)

59. The Agreement explicitly denied Mead the "right to display or produce facsimile reproductions of The New York Times." (Exh. 38 at M003642, M003646.) This right was specifically retained by The New York Times, along with "(1) *print rights*, (2) performance rights, (3) *micropublication* (e.g. *microfilm* and *microfiche*) [rights]

> *and all other facsimile reproduction rights*, so long as in the exercise of those rights (A) material from The New York Times is stored in *non-coded form* [picture elements]; (B) any coded retrieval

> system whereby such non-coded information is retrieved does so by single term non-conjunctive searches using The New York Times Index, . . . ; and (C) if the non-coded information is displayed on an electronic device, the information will be displayed as *facsimile images of full pages of The New York Times or sections of a full page, so long as any section displayed contains more than an individual article and conforms to the page format and layout*." (Exh. 39 at U007430 (emphasis added).)

60. The exclusive rights The New York Times granted Mead under this Agreement were and are exploited in Defendant NEXIS' On-Line product of that name. (Exh. 38 at M003642-3698). Several of the rights it had "reserved," on the other hand, were shortly thereafter granted to UMI.

The 1983 UMI License

61. In April of 1993, The New York Times granted UMI[26] *inter alia*:

> The exclusive right, throughout the world, to reproduce, display, transmit and distribute *Facsimile Copies* (as defined in section I.B) *of entire issues of NYT Publications and of complete sections, individual full pages* (other than front pages . . .), *and portions of full pages of such issues so long as any portion of a page distributed*

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26. To reiterate, UMI was a "unit of the Xerox Corporation" at the time. (Exh. 39 at U007399).

> *or displayed contains more than an individual article and conforms to the page format and layout of the page from which it is taken.*

(Exh. 39 at U007357 (emphasis added).) The Agreement defined the term "facsimile copy" as:

> a reproduction (1) stored in *non-coded* form (picture elements) and (2) which may be produced or displayed, by using a machine or device, in the size of the original or in reduced or enlarged format; provided, however, that with respect to *The New York Times*, any coded retrieval system provided by Xerox or on its behalf whereby such non-coded information is retrieved, does so by single term non-conjunctive searches using *The New York Times Index* . . .

(Exh. 39 at U007358, section 1.B.) (emphasis added).

62. Again, The New York Times specifically retained certain rights, including:

> (1) print rights;
>
> (2) performance rights, . . .
>
> (4) all rights, other than those granted . . . [UMI] and set forth in the Agreement, to distribute and sell editorial material from the NYT Publications, through coded or non-coded electronic or other technology.

(Exh. 50 at U007090-91.)

63. In practical terms, this 1983 license granted UMI the right to produce and distribute facsimile copies of The New York Times on microfilm, in microfiche, and in what are today known as "CD-ROM image products." (Exh. 39 at U007164-U007171; Exh. 21 ¶¶ 83, 92). By the same token, what has historically been referred to as the "Mead License" granted Mead certain *non*-facsimile rights. Principal among these was the right to create "text-only" data bases that would be amenable to Boolean searching, using articles from *The New York Times*. (Exh. 21 ¶ 132; Exh. 38 at M003645, M003647, M003689, M003691).

Subsequent Amendments To The UMI License
And a Three-Way Agreement To Cooperate
In The Production of Text-Only CD-ROMS.

64. For a time, the defendants The New York Times, NEXIS and UMI were unable to agree on whether the right to produce and market "text-only" CD-ROM products was included within the original grant of rights to Mead or whether it fell within the rights that The New York Times had retained under the Mead Agreement and could grant UMI. (Exh. 21 ¶¶ 106-107; Exh. 38 at NYT000012-0000013; Exh. 45 at NYT000326-327; Exh. 45 at NYT000328-329; Exh. 50 at U006922-40; Exh. 39 at U0006942-47; Exh. 50 at U007025-27; Exh. 45 at M010818-010820; Exh. 45 at M011427-011436.)

65. In 1989, the New York Times and UMI executed a CD-ROM agreement that permitted UMI to create a CD-ROM image product that would include images of the Sunday Magazine and Book Review, along with materials

from other periodicals,[27] but not other sections of the Sunday *New York Times*. (Exh. 50 at U007080-81, U007488-007491; and see Exh. 45 at NYT000482-487.) The Agreement explicitly provided that the text of the Magazine and Book Review "will *not* be stored or made available as 'text' but as facsimile of the entire page."[28] (Exh. 50 at U007080) (emphasis added).

66. The first attempt among the parties to negotiate an agreement to create a "text-only" CD-ROM began in 1991. (Exh. 21 ¶¶ 96 and 97.) The NYT, Mead and UMI did not reach an agreement on this issue until 1993. (*See* Exh. 50 at U007077-79, Exh. 39 at U006942-6947 (5/6/93 Amendment to 4/5/83 New York Times-UMI license); Exh. 49 at M011427-M011436 (draft).) In 1993, the NYT and UMI amended their 1983 license, effective January 1992, to provide that the NYT was granting UMI: (i) an exclusive worldwide copyright license to manufacture and sell CD-ROM (ASCII) format versions of textual . . . materials that had previously been included in its microfilm products; (ii) a non-exclusive worldwide license to manufacture and sell CD-ROM (Image) products containing such materials

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27. This CD-ROM product has come to be called "General Periodicals On Disc."

28. A Rider to the Agreement further provided "[a]s a condition of the Agreement . . . that . . . [UMI] will only allow . . . [pages of the Sunday Magazine and Book Review] to be retrieved using single term non-conjunctive searches using The New York Times Index . . . or an index of similar nature," thereby ruling out searches and/or retrievals using Boolean logic. (Exh. 50 at U007080-7081, U007488).

and (iii) a non-exclusive worldwide license to manufacture and sell CD-ROM (ASCII) and CD-ROM (Image) products containing material from The New York Times but which do not contain full text issues of The New York Times. (Exh. 39 at U006944, 006942-47.) The Agreement defined a CD-ROM ASCII product as a "CD-ROM product which uses only *coded* computer storage and text-mode terminal display," and a CD-ROM Image product as a "CD-ROM product which uses only *non*-coded computer storage and displays *scanned, full or partial page images* from The New York Times newspaper." (Exh. 39 at U006944) (emphasis added).

67. At or about the same time, The NYT, Mead and UMI reached a three-way agreement, pursuant to which The NYT consented to UMI's including articles from *The New York Times* in its "ProQuest database" and to Mead's supplying the data that would be included on condition that above the first paragraph of text of each article the following statement was displayed: "Copyright 199-The New York Times," followed by "Data supplied by NEXIS® Service."[29] (Exh. 21 at ¶ 104, Exh. 39 at U6909-14, NYT000002-NYT000011.) In addition to the acknowledgments afforded The New York Times and NEXIS, UMI was also permitted a copyright notice. (Exh. 3).

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29. UMI's "text-only" CD-ROM product came to be known as "New York Times On Disc."

Affidavit of Emily Bass

The License Agreement Between Newsday and Mead

68. Articles from Newsday first appeared in the NEXIS data base in 1988, pursuant to an April 21, 1988 contract in which the former granted Mead a

> non-exclusive world-wide license . . . to use and authorize use by others *of all or any portion* of the information and materials identified in Schedule A hereto (the "Licensed Materials") in connection with MDC's development, creation, rendition, display, dissemination and distribution, directly or through third parties of computer-assisted information products or services. The rights embraced by the License include, but are not limited to, the right to display and authorize displays of Licensed Materials by means of computer-assisted devices, telecommunications and systems; the right to reproduce and authorize reproduction of Licensed Materials in visually perceptible or machine-readable copies in connection with computer-assisted information products or services; the right to distribute and authorize distribution of visually perceptible or machine-readable copies of Licensed Materials in connection with computer-assisted information products or services; and the right to prepare and authorize preparation of machine-readable concordances and other similar derivative works based on Licensed Materials.

(Exh. 40 at M003709). Schedule A provided that Licensor's Materials would "consist of, subject to the exclusions set

forth in section II, all stories from *Newsday* . . ." (Exh. 40 at M003719). Section II listed the following "Exclusions":

1) Advertisements

2) Legal Notices

3) Graphic materials, e.g., charts, cartoons, maps, photos

4) Weather Forecast

5) *Selected Syndicated Materials and Freelance Materials*

6) Sports polls, rosters

7) Sports statistics

8) Sports schedules

9) Racing picks, charts, bets, etc.

10) Money-rate tables

11) Mutual fund prices & tables

12) Stock tables

13) Commodity market tables

14) Paid death notices

15) Movie and TV listings

16) Selected Wire Services

(Exh. 40 at M003719).

Affidavit of Emily Bass

The License Agreement Between Time Inc. and Mead

69. On or about November 27, 1990, Time Inc. entered into a license that was nearly identical to Newsday's license, both in terms of the scope of its grant[30] and the identity of the materials that were being excluded from the materials being licensed. (Exh. 41 at T000007-000027). The latter were

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30. Under the Agreement, Time Inc. granted Mead:

> a non-exclusive, worldwide license . . . to use and authorize use by others of all or any portion of the information and materials identified in Schedule A hereto (the "Licensed Materials") in connection with MDC's development, creation, rendition, display, dissemination and distribution, directly or through third parties, of on-line computer-assisted information products or services (including MDC's LEXIS/NEXIS services). The right embraced by the License include, but are not limited to, the right to display and authorize displays of Licensed Materials by means of computer-assisted devices, telecommunications and systems; the right to reproduce and authorize reproduction of Licensed Materials in copies (including printed, electronically displayed and machine-readable copies) in connection with computer-assisted information products or services; the right to distribute and authorize distribution of copies (including printed, electronically displayed and machine-readable copies) of Licensed Materials in connection with computer-assisted information products or services; and the right to prepare and authorize preparation of machine-readable concordances and other similar derivative works based on Licensed Materials. (Exh. 41 at T000007-000008).

defined by a schedule attached to the end of the Agreement. It provided that the following would not be included in the Licensor's Materials:

> 1. *Such portions of the materials which Licensor does not have the right to include in Licensor's Materials.*
>
> 2. All material appearing on the cover page.
>
> 3. Graphic materials, such as photographs, drawing, maps, charts, tabular data and cartoons . . . .
>
> 4. Tables of contents.
>
> 5. Information concerning addresses to which letters to the editor may be sent, subscription rates, volume numbers, etc.
>
> 6. Masthead materials (including names of editorial staff and corporate officers).
>
> 7. Advertising materials.
>
> 8. Mathematical formulas and equations.
>
> 9. Special issues of a publication (e.g. Sports Illustrated Year in Sports) that are available in addition to the regular issues of the publications. (Exh. 41 at T000019) (emphasis added).

* * * * *

70. Under each of these Agreements, the publisher had the right to require Mead to exclude or remove materials that would expose the publisher (and/or Mead) to liability for copyright infringement. (Exh. 38 at M003663; Exh. 40 at[31] M003711; Exh. 41 at[32] T000020 and Schedule A, appearing on T000019).[33] Mead and UMI were entitled to be indemnified against copyright claims. (Exh. 38 at M003662;[34]

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31. The NYT/Mead contract provides that "[i]f The Times notifies NYTIS [predecessor to Mead] that a specific item or items included in the Licensed Products does or is liable to constitute a defamation, invasion of privacy, *copyright infringement*, or otherwise expose The Times (or NYTIS) to liability . . . , NYTIS shall without delay change or delete said portion of the Licensed Products as indicated by The Times." (Exh. 38 at M003663) (emphasis and id. added).

32. The Newsday/Mead Agreement provides: "Licensor may from time to time during the term of this Agreement give notice to MDC that a particular document's continuing presence in the Licensed Materials may be damaging to Licensor. As promptly as is reasonably possible after receipt of such notice from Licensor, MDC will delete such document from the MDC computer system; provided Licensor delivers to MDC, at the time such notice is delivered, al the information necessary to identify such document." (Exh. 40 at M003711)

33. The Time/Mead Agreement provides: ". . . Licensor shall advice MDC in writing which, if any, materials . . . are excluded materials . . . which may not be made available to MDC's services. MDC will delete such excluded materials from Licensed Materials . . ."

34. The NYT/Mead Agreement provides that "The Times hereby agrees to indemnify NYTIS [read Mead] and its officers directors and employees . . . against any and all liability and costs of defense

(Cont'd)

Exh. 40 at M003714;[35] Exh. 41 at T000013[36]; Exh. 49 at M011433;[37] Exh. 50 at U007080).

By the same token, Mead and UMI promised that "copyright" would run with each story or article and that they would use "all reasonable efforts to cause displays or copies of Licensed Materials to bear the words "Copyright [*Print Publisher*]" . . . *at the beginning of each complete document displayed, reproduced or distributed in copies*." (Exh. 40 at M003711 (emphasis added); Exh. 41 at T000009;[38] Exh. 38 at M003665; Exh. 49

(Cont'd)
for claims of libel, invasion of privacy . . . *and for claims of copyright infringement* . . . *The Times shall have full control of the defense of any such claims* . . .". (Exh. 38 at M003662) (emphasis added).

35. The Newsday/Mead indemnification clause provides that "[t]he scope of this indemnification includes . . . claims in the nature of copyright . . .". (Exh. 40 at M003714).

36. The Time/Mead clause reads similarly and extends to copyright claims. (Exh. 41 at T000013).

37. The document bearing Bates stamp #'s M011427-011436 is denominated "CD-ROM Draft: 10/26/93." The defendants did not provide us with a copy of the final agreement in discovery. (The defendants took the position that they were not required to provide us with any documents that bore dates after the commencement of this action on the ground that they were per se irrelevant.)

38. The Time/Mead contract provided that "MDC shall use reasonable efforts to cause each document that MDC displays or distributes in copies to bear (i) the word "Copyright" or the abbreviation "Copr.", (ii) the year of first publication of such document as specified by Licensor, and (iii) (a) . . . the name "Time Inc." . . . [or] . . . "The Time Inc. Magazine Company".

at M011430[39]; see also Exh. 50 at U006722). Conversely, the publishers warranted that they held the copyrights that were required to enter into the Agreement and that Mead's exercise of the License "will infringe no copyright or other right of any person." (Exh. 40 at M003709; Exh. 41 at T000008; Exh. 38 at M003664; Exh 49 at M011432; Exh. 50 at U007080).

71. As will hereinafter be seen and as is explained more fully in the accompanying brief, the publishers did *not* hold the copyright on at least *some* of the individual articles on which their copyright notices were being displayed. At the very least, they did not hold the copyright on plaintiffs' articles.

WHEREFORE your affiant prays that the Court grant plaintiffs' motion for summary judgment on the issue of liability in its entirety.

Dated: March 15, 1996
New York, New York

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39. In the draft CD-ROM Agreement with which plaintiffs have been provided, UMI guarantees that it will display "Above the first paragraph of text of *each article" that is displayed* the legend "Copyright 199_ The New York Times." Following the Times' copyright notice, it will display the legend "Data supplied by NEXIS® Service", and "in the search data caption *above each article*," it will display the legend "Pro Quest . . . The New York Times." (Exh. 49 at M011430) (emphasis added).

Affidavit of Emily Bass

s/ Emily Bass
Emily M. Bass, Esq.

Sworn to before me this
15th day of March, 1996

s/ T. P. Higgins
Notary Public

THOMAS P. HIGGINS
NOTARY PUBLIC, State of New York
No. 02H15017628
Qualified in New York County
Commission Expires September 7, 1998

Affidavit of Emily Bass

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12	Affidavit of Sonia Jaffe Robbins, dated March 12, 1996

13 Affidavit of Jonathan Tasini, dated March 12, 1996
14 Affidavit of David S. Whitford, dated March 13, 1996

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15 Affidavit of Glenn Williams, dated March 13, 1996
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DEFENDANTS' CONTRACTS

Agreements With the Plaintiffs

36 Agreement between David Whitford and Sports Illustrated, dated April 8, 1991

37 Agreement between Jonathan Tasini and The New York Times, dated April 29, 1993

1. Since we do not want to burden the Court with duplicative exhibits, we are not supplying copies of the transcripts of Plaintiffs' depositions at this time.

Affidavit of Emily Bass

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2. Provided in numerical order.

EXHIBIT 1 – SAMPLE ARTICLES PRINTED FROM MICROFILM

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 2 — SAMPLE ARTICLES PRINTED FROM NEXIS

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 3 — SAMPLE ARTICLES PRINTED FROM "THE NEW YORK TIMES ONDISC" CD-ROM

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 4 — SAMPLE ARTICLES PRINTED FROM "THE GENERAL PERIODICALS ONDISC" CD-ROM

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 5 — PUBLISHER DEFENDANTS' COPYRIGHT REGISTRATIONS FOR THE COLLECTIVE WORKS

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 6 — PLAINTIFFS' COPYRIGHT REGISTRATIONS FOR THE INDIVIDUAL ARTICLES

[N.B.: This Exhibit is not included in the Joint Appendix, but is reprinted in a separate Lodging With Joint Appendix, Volume II — Articles And Registrations.]

EXHIBIT 15 — WILLIAMS AFFIDAVIT (WITH CURRICULUM VITAE), DATED MARCH 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 93 CIV 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS, DAVID S. WHITFORD, and H. BRUCE FRANKLIN,

Plaintiffs,

– vs –

NEW YORK TIMES CO., NEWSDAY INC., TIME INC., THE ATLANTIC MONTHLY CO., THE MEAD CORPORATION, and UNIVERSITY MICROFILMS INC.

Defendants.

AFFIDAVIT OF GLENN R. WILLIAMS

State of New York :
: ss
County of New York :

Glenn R. Williams, being duly sworn, deposes and says:

Pursuant to Fed. R. Civ. P. 26, I have previously provided plaintiffs with an expert report. I am now providing the

substance of that report in affidavit form so that it may be used in support of plaintiffs' Motion for Summary Judgment in this matter.

1. My name is Glenn R. Williams. In addition to the professional experience directly relevant to the case detailed below, my academic and other qualifications are detailed in the attached resume. I have been asked by Emily Bass, Esq., to provide assistance in the interpretation and evaluation of the technological aspects of a case involving the transformation of writings originally prepared for the print media into data which is subsequently sold to purveyors and/or users of electronic media, including on-line services, CD-ROM, and microform reproduction.

Professional Qualifications

2. I have over 17 years' experience as a technical professional in the computer industry as a designer of computer systems and computer programmer. I am thoroughly familiar with the operation of mainframe, mini and microcomputers. Since 1987, I have designed data and/or text processing and search and retrieval systems similar to those described by representatives of the various defendants in this case, as well as on-line services. I am thoroughly familiar with and have worked on all of the operating systems referred to in this case to date.

3. Specifically, my professional experience includes the following:

As the manager of product development at Generation Sciences, Inc., I wrote and published the Reference Manual

and Users' Guide for their product, Gamma. This was an application generator package developed for, among others, LILCO, Eastern States Bancard Association, AFG Manufacturing and Western Union. As the lead developer, I designed and wrote extensions to the software including the interfaces to IMS, TOTAL, UCC-10 and Burroughs databases, on-line transaction processing and validation program generation, and internal semantic interpretation routines.

In addition, I designed and wrote applications for major firms in the banking, credit card, educational and utilities industries. I have written text processing and transfer programs for both mainframe and Personal Computers, in a variety of computer languages, including those that access IMS, a data base program developed for NASA and used by the New York Times Index.

4. From 1985-1987, I also taught in-depth courses in the use of application generation software, both in person and via videotape lectures, for J.P. Stevens Company, Essex Wire, Banker's Trust, and Tarkenton Software, Inc. Among clients for whom I have developed data-base systems are Smith Barney, CT Corporation (providing commercial software for on-line access to legal information services), CitiBank, New York Board of Education, Columbia University and Western Union. My responsibilities at these institutions included designing, programming, implementation, writing documentation and teaching others to use the systems.

5. During the past eight years, I have designed and programmed several large-scale search and retrieval systems,

and developed commercial software packages for the legal industry, two major banks, and a private commercial software house. These systems utilized state-of-the-art technology and relational database systems such as IBM's DB2, Borland's Paradox, dBase II and dBase IV, as well as sophisticated on-line monitor systems like CICS (IBM's Customer Information and Control System) within distributed processing environments.

6. In addition to this work in on-line systems, I have written several software packages for a variety of platforms which incorporate semantic textual analysis, text-formatting and telecommunications concepts for both PC-based system and Internet marketing. In each case I have also written both the functional specifications and system design documents as well as the program code. I have broad experience with text processing and desktop publishing systems and products on several platforms and operating systems: nroff, Troff, Tex and LaTex for Unix; Word Perfect, Word, DeScribe, LaTex, Hypertext Markup Language (HTML) for MS-DOS Windows and OS/2; Script/VS and Generalized Markup Language for the IBM mainframe.

7. Additional personal data, academic training, professional training and expertise are indicated in the attached Curriculum Vitae. Other than programs, program documentation, reference manuals and instructions and the teaching indicated above, I have not published books or articles, and have not testified in court as an expert witness. I am being paid at the rate of $100.00 per hour for consultation and $150.00 per hour, should I be required to testify in court.

Exhibit 15

Purpose of report

8. I have been asked to interpret for a lay reader the information provided by the defendants in this case relating to their conversion of work prepared for a print medium — i.e., to appear as an article in an edition of a newspaper or a magazine — into information available on an electronic data base (either on-line or via CD ROM) accessible by subscribing customers in the general public.

9. I have also been asked to offer an opinion *inter alia* as to whether the technological operations performed in order to convert text files that contain work written for publication in the print media into data available to an ultimate user are:

— (a) necessary to accomplish the transfer of text from one technology or medium to another (e.g., print to on-line service or CD ROM);

— (b) limited to those necessary to make that transfer;

— (c) necessary or appropriate for the purpose of creating a permanent record of the original publication (e.g., for archival purposes);

— (d) essential to the development and marketing of a product that can be sold by electronic data-base producers and vendors to ultimate users (institutions and individuals with Personal Computers) and, if they are, the nature of the product such operations create.

Exhibit 15

10. I have also been asked to express an opinion as to whether:

— (a) within the electronic information industry, the availability of a single verbal text in a number of different technological modes constitutes a single product, or a number of different products;

— (b) whether the electronic files of individual articles originally appearing in a print medium and subsequently converted for use in on-line services or CD ROMs are "the same as" the electronic files used to print the article;

— (c) whether the electronic file of an individual article available as part of a database is available to consumers only as part of the original edition in which it appeared or can be obtained independently; and

— (d) whether currently existing technology either permits or precludes a database provider from ascertaining the number of times a particular article has been accessed or down-loaded.

Summary of Conclusions

11. With respect to the questions in Paragraph 9, above:

— (a) Many of the operations performed upon the electronic files of an author's text are necessary to transfer the article from one computer system to another, to send it via communications systems, and to transfer it from one electronic medium to another, or from a non-electronic to an electronic medium, or vice versa;

— (b) According to the testimony in this case, the electronic transformations performed are not limited to those required by the technologies involved;

— (c) The only format mentioned that serves a permanent archival function is the preservation of the physical copies or, in the case of the New York Times, the "mechanicals" of each edition. "Microform" duplication — such as microfilm — also serves an archival function, and permits limited duplication and access at more than one site. The other media mentioned do not preserve the entire text of all the printed material in a publication, nor the graphic material, nor the articles in their visual and verbal context (i.e., as located with respect to other articles, placed on the page, and related to other features or advertising). They cannot be said to serve any true archival purpose; and

— (d) Among others, the operations related to indexing, marking the text and performing the operations necessary to permit "search and retrieve" functions are not required by the technology, but essential to the development of a product whose primary feature is the ability to quickly locate relevant material within and even across vast data bases.

12. With respect to the questions in Paragraph 10, above:

— (a) The fact that many different products make the same text available to users does not make them the same product. For example, an article available in the Encyclopedia Britannica in bound volumes in the library

is not, from the standpoint of technology or marketing, the same as accessing the article from a CD ROM of the Encyclopedia, or down-loading the article from an electronic service that provided it on-line. The text would be the same, but the service, in each case, is a different product. A still different product would be an on-line data-base specializing in the topic (for example, if one is doing research on marsupials, a data-base maintained by or for zoos);

— (b) The two electronic files containing what may appear as identical printed text are not the same, either technologically or from the standpoint of marketing. The electronic data recording the letters that compose the words of an article are merely the print-visible part of the electronic files. The files that are sent to a printer contain all sorts of "invisible" printing codes, formatting information, etc. Each time a file containing text is sent from one computer/program to another, it undergoes significant changes, whether manually or electronically made (e.g., by a computer program that translates one computer formatting language into another);

— (c) Text integrated into a data base is available to a large number of users independent of its original appearance as part of a series or collection of articles published together at any given time as a single edition. The data bases deal in articles, not editions; and

— (d) Available technology would permit vendors to develop systems to track the usage of articles accessed on-line or perhaps by CD-ROM hardware attached to an on-line system.

Exhibit 15

13. In addition to my personal knowledge and experience, this report is based upon the following:

A. I was present at the deposition of:

(1) James E. Patterson, Vice-president of Business Information Services at the New York Times, taken on April 6, 1995;

(2) Mary Anne Skinner, Library Director for Newsday, taken on April 6, 1995;

(3) Lany McDonald, director of Time, Inc. Library, taken on April 6, 1995;

(4) Patrick M. Guiant, Vice President of Product Management and Development for UMI, taken on April 13, 1995;

(5) Richard Petrosino, Manager of Business Information Services for LEXIS-NEXIS (Mead);

(6) An informal information session with Mr. Raymond E. Douglas, Vice President of Systems and Technology for the New York Times, held on May 23, 1995; and

(7) The Rule 26(a)(2)(C) Report provided by Archivist Linda Edgerly to the plaintiffs.

B. I have reviewed the transcripts of the depositions of the witnesses who testified.

Exhibit 15

C. As general background material, in addition to that listed above, I am familiar with and rely upon the technical account of the development of the New York Times Thesaurus and Information Bank System available in Harlan Mills, *Principles of Information Systems Analysis And Design*, Academic Press, 1986.

14. As a general matter, with the exception of the representative of UMI, the persons who testified at the depositions neither claimed nor exhibited significant knowledge about the technical aspects of the process of transforming text-for-print into text-for-on-line-data-base production and retrieval. My conclusions therefore represent the application of general principles about how the technology of the data-processing, communications and retrieval process operates to the specific facts provided regarding the steps performed by each defendant in the process of transforming text-for-print into text for searchable databases.

General Observations

15. It follows from the fact that there are various kinds of hardware, software and computer languages in existence and that there are different uses to which the text of articles originally published in print media can be put that the text an author submits to his editor undergoes a variety of transformations before it appears in print as part of a particular edition of a particular periodical. From a technological standpoint, it cannot be said that the electronic data file containing the author's submission prior to printing is the same electronic data file as that sent to the printer, or via ATEX to Mead.

Exhibit 15

16. Each transformation of the "envelope" of electronic data which interacts with various kinds of hardware and software creates a different electronic file. If the electronic file to be transmitted from the author to any publisher (when the publisher receives data electronically from the author), or from any publisher to Mead, were mistakenly sent, for example, to the New York Times printer, its content would not be printed. Similarly, if the file for the printer were sent to Mead, the data-base producer would have the "wrong file" for the purposes of adding to its New York Times on-line data base.

17. Additional transformations are required to transfer the text of an article from any publisher to Mead for incorporation into an on-line electronic data-base service, or from Mead to UMI for incorporation into a file on a CD ROM.

18. The only format that "reproduces" the article-as-printed by means of an "electronic photograph" of the page on which it appears is UMI's microform reproduction process (including both microfilm and microfiche). The on-line services and text-only CD ROM products that UMI produces do not capture and transmit images of pages of a publication, but rather different versions of electronic text that includes (but is neither limited to nor identical with) the text of the article as it appeared in print.

19. On the basis of the testimony of the publishers in this case and my knowledge of the electronic information industry in general, it is apparent that what the publishers transfer to the data-base providers is not entire editions of

any print-medium publication, but rather selected "information included from the [periodical] that people want to read" (Deposition of Guiant, UMI at 13), or "data from" a periodical which can be used to recreate "the text" of an article in an electronic "format that can be . . . searched and accepted by the data-base vendors." (Deposition of McDonald, Time, Inc. at 6, 10, 12.) Human criteria also intervene to identify and select what information will be sent to data-base vendors. Although people also want to read stock reports and do crossword puzzles, that data is *not* transmitted.

20. One data-base vendor (UMI) confirmed that the "data" of interest to the data-base vendor is not entire editions of newspapers, but "the series of words exactly as they appear" in individual stories published in a newspaper or magazine. While hard-copy and microfilm versions of entire editions in the print media faithfully reproduce the original record, they are technologically not amenable to the "search and retrieve" function that creates the demand for the service provided by the data-base vendors. (Deposition of Guiant, UMI, at 31.)

21. Once an article has been prepared for transmission to Mead, transmitted and received, the data-base producer performs a number of additional operations to facilitate the searching and retrieving of individual articles. This includes removing any special formatting codes inserted for transmission or use by the transmitter and the processing of the text by a "Term Topic Identifier" program that identifies significant words in an article corresponding to index topics. When those words are identified by the program, they are marked in a way that facilitates recognition and retrieval

when an ultimate user makes a search request. Finally, a "searchable lead" is created to help a user identify the main topic of an article.

22. At least up to the present time, the search-and-retrieval capabilities of computer programs depend upon the program's ability to match the symbols used to represent the "search" words (or numbers) input by the user with those same words appearing as text in the data base. Because images are binary data, and not text-data, they cannot be incorporated into a text-only data base such as ASCII or ATEX. Thus, images are not amenable to searching.

23. The exclusion of images from the data transmitted by publishers to data-base creators and vendors is not the result of technological limitations, however. Rather, it is the result of a decision about what technology to use in order to accomplish a particular goat: selling a product that provides individual subscribers quick access to a vast amount of information from a variety of different sources. Were the goal of the data-base vendors purely or even predominantly archival, they could and would chose a technology suited to that purpose: microfilming.

24. Although it is possible to electronically "scan" an image of a page of a newspaper into a computer, and create an exact replica of each page, it would not be possible to search for a particular word or topic in that image in order to locate a story containing information sought by a researcher or writer.

25. What the data-base producers purchase from the publishers for their "full-text searchable" products is thus

not entire editions of any publication, but a separate product, specially prepared for them, that uses much of the content of the publication, but in a format amenable to the "search and retrieve" function.

26. To this end, the publishers dedicate considerable resources to the task of disassembling" each edition, i.e., taking certain electronic files that are resident in their computers, deleting certain information from those files and adding other information in order to satisfy the demand for the text of discrete articles that can be retrieved by theme, author or key words, independently from the rest of the edition in which they originally appeared.

27. Although initially there were technological reasons for not transmitting graphic images, and therefore, not transmitting images of physical pages by electronic means, this technological factor is not today either the only, or even a primary reason for publishers and data-base providers dealing in individual articles rather than in entire editions or pages. Today, the reason for not transmitting facsimiles of pages of a newspaper lies not in any technological difficulty in the transmission of images, but in the technological difficulty of searching and retrieving text transmitted in a format that carries images as well as graphics.

28. The operations required to "disassemble" an edition of a newspaper or a magazine and turn it into text amenable to electronic transmission and efficient searching and retrieving as part of a huge data-base system (such as those described in the depositions of Mr. Patterson (New York Times) and Ms./es McDonald (Time, Inc.) and Skinner

(Newsday) would not be required for mere archival storage of whole editions of a newspaper or magazine. Such archival storage was and is being done both physically (e.g., by retaining the mechanicals) and on microfilm.

29. The transformation of a particular edition of one of the print publications (New York Times, Sports Illustrated, Newsday) into data files available for transmission both to and by database services makes an individual article that had appeared as part of a print publication available to the general public ***independent and apart from*** the other articles, stories, advertisements, graphics and statistics, etc. that had appeared together with it in a particular edition.

30. An individual who subscribes to NEXIS or who sits down at a ProQuest (New York Times Ondisc) work station and asks the database service to search for information regarding the similarities between cantaloupes and cassava melons will come up with a list of stories or articles that somehow discuss or contrast the two. (If his search is "cantaloup! w/7 cassava," he will at least get a list of articles that *mention* the two types of melon, even if they don't compare or contrast them. Some of the articles on the list are likely to be on point.)

If he then chooses to view one of the items on the list that was found to contain the two search terms, NEXIS or ProQuest will make the article in which the two terms "occurred" available for viewing by itself, independent of other articles and of graphics that appeared with it when the article appeared in print.

Exhibit 15

I myself have done searches of this type on these systems and can attest that this is the case.

31. Reproduction in microfilm preserves the complete original edition of a publication. While it is excellent as an archival form, it does not make individual articles identifiable and accessible independently or apart from the edition in which they appeared. Microfilm versions of printed periodicals preserve entire editions of a newspaper or periodical for use in more places and for longer than paper editions, which are subject to deterioration and bulky to store.

32. Because microfilm lacks both the wide-distribution, vast data-base and search and retrieval capabilities of the CD-ROM and on-line service technologies, the potential for future use of an article or story is vastly greater in the latter technologies than in the former. The principal marketing distinction between CD-ROM and on-line data-bases that visually provide the same texts and search and retrieval capabilities is the ability of the data-bases to permit the data-base user to scan vast and constantly-updated sources of information, and retrieve and download only those particular articles worthy of occupying space on his or her hard or floppy disk. Purchasers of CD ROMs can acquire a vast amount of information through which they can search, but it provides access to a finite quantity of information dating back from the date of production of the disk. Updates are more cumbersome and much less frequent, and information can only be acquired for printing if the user has purchased or leased the entire disk, rather than the few minutes of on-line time it might take to find a single article and down-load it. CD ROMs also provide access to a single, although

vast base of data, while on-line services may provide simultaneous access and searching across a number of data bases. Information accessed from an on-line data base may be "downloaded" onto a personal computer for subsequent retrieval, reading, or modification. According to the UMI witness, texts stored in CD ROM format can be searched and retrieved, but then only printed. They cannot be downloaded or copied to the disk of a personal computer. In the opinion of the undersigned, this is not a technological limitation inherent in the CD ROM format.

33. The application of the electronic technology to the texts of articles appearing in print media has vastly increased the market for individual articles independently of their original context as part of a printed edition.

FINAL CONCLUSIONS

34. No change in the **text** of an individual article is required to transform an article appearing in print to one available from an on-line service as part of an electronic data base.

35. The *elimination* of formatting and location codes, instructions regarding physical spacing and other notations inserted into the electronic text of the article sent to a printer is essential to the transformation of an electronic text prepared for print publication into one that can be incorporated into an electronic data base.

36. By the same token, information must be *added to* or *inserted in* the data so as to enable the data-base producer

and on-line service-provider to indicate the origin of an article and to link an electronic file containing the text of an article with the appropriate headline, by-line and/or caption. (Although photo illustrations are excluded from the material provided on-line, descriptive explanations of the material that has been excluded are often provided in their stead.)

37. At this point in the development of the CD-ROM technology the deletion or exclusion of images from a printed page is not necessary for the transformation of a printed page either into that medium or into an on-line medium. The presence of images inhibits the searching function, however.

38. The indexing work performed by the publishers and database producers and providers is essential to the availability of an article for retrieval from an electronic data base, either on-line or CD-ROM. It is not work that is essential to the creation of a permanent archive.

39. The manual indexing and abstracting of The New York Times that was done prior to 1983 enabled professional researchers to re-use hard-copies of the printed periodical and helped to create a research market for microfilm versions of the periodical. Because of its relative cost and inaccessibility, it did not create a significant market for re-publication or re-use of individual articles.

40. Such a market was created by the combination of the vast data-base capabilities of modern computers, the development of powerful personal computers, and the development of powerful search-and-retrieve programs that permit individuals to find and retrieve individual articles on

the basis of index terms, key words or by-lines within extensive data-bases or across data-bases from different sources.

41. Both the reformatting and indexing performed by the publishers prior to transmission to LEXIS-NEXIS, and by LEXIS-NEXIS thereafter, is essential to the creation of a new product that provides ultimate users with rapid access to individual articles on a given theme. It is unnecessary for and/or inconsistent with the creation of a permanent archive.

42. The electronic data files containing the "post-print" versions of works of individual authors can not be said, from the perspective of technology and marketing, to constitute the same work or a revised version of the original newspaper or magazine in which they appeared, but are a different product altogether. Individual articles are marketed as part of a large data-base, not individual editions of a particular publication. For example, while it is possible for an ultimate user to "down-load" (write to his or her disk), view or print an entire article from NEXIS, it is impossible to retrieve or display an entire issue or edition as a single unit. This is because, as I stated before, the database deals in articles, not editions. (The fact that the publishers and database producers assign individual "accession numbers" to articles and not editions confirms this fact.)

43. At ¶ 29 of their Rule 3(G) Statement, the defendants attempt to finesse this issue. They state:

> After receiving the electronic transmissions from the Times Co. and Newsday, NEXIS transfers,

Exhibit 15

> and at all times relevant to this action transferred, the content of each day's articles in their entirety, and without substantive revision, to its computerized library. As a result, the textual content of each daily edition of the New York Times and Newsday in the NEXIS computerized library is substantively identical to the daily editions printed on paper and the microfilm and microfiche editions of each newspaper.

From a purely literary point of view, the defendants may be accurate — that is, the print visible text of the article that appears in the paper is the same as the print visible-text of the article that can be called up to the computer screen. Stated otherwise, the words and word sequence of the two are the same. (Indeed, it is *because* this is so, I am told, that the defendants are guilty of copyright infringement. They have copied the plaintiffs' words.) From a technological or commercial standpoint, however, it is not accurate to say that there has been no "substantive revision." The products that result from the procedures that the defendants are referring to are very, very different from the papers that the publisher defendants have historically produced.

OBSERVATIONS

44. On the basis of the testimony summarized in the previous paragraphs and my experience and learning in the industry, it is obvious that while available technology permits a data-base vendor to receive, store and transmit images of entire publications (such as is done with The New York Times Book Review and Magazine), preserving both the

physical images (e.g., photo illustrations) and the verbal contexts (other articles, advertising, etc.) of individual articles in a publication, the fact that the "image" itself can not be "searched in any way" (Deposition of Guiant, UMI, at 73, line 6) means at present, an "image only" product would have significantly lower market potential than a product that can be fully searched.

45. Although none of the defendants whose deposition I attended testified that they did so, there is, to my knowledge, no technological barrier to keeping track of the number of times a particular article has been accessed or downloaded.

Dated: March 13, 1996
New York, New York

s/ Glenn R. Williams
Glenn R. Williams

Exhibit 15

Curriculum Vitae

Glenn R. Williams
16 Park Place
Brooklyn NY 11217 USA
(718) 783-3842
email: gloonie@ibm.net

Personal Information

Date/Place of Birth	29 Sept 1952, Urbana, IL
Marital Status	Married
Dependents	None (2 grown children)
Citizenship	USA
Passport Nbr / Expiration	150200076 / 22 Mar 2003

Academic Education

State University of New York *at Stony Brook, NY*	Master of Arts with Distinction
The Colorado College *Colorado Springs, CO*	Bachelor of Arts with Honors Phi Beta Kappa, Cum Laude

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Technical Training

Digitalk, Inc.	Nov 1993	Smalltalk/V: Intro to Objects
Metaphor Computer Systems *New York, NY*	June 1990	Advanced Metaphor
Metaphor Computer Systems *New York, NY*	July 1989	Metaphor Application and Design
TeraData Corporation *New Hyde Park, NY*	May 1989	Teradata DBC Structure and Physical Design
Information Resources Inc. *New York, NY*	Sept 1987	Mainframe *Express* Applications And Concepts.
Online Software Int'l *Ft. Lee, NJ*	Aug 1984	IMS DB/DC Application Programming
IBM (Education Division) *Briarcliff Manor, NY*	June 1980	CICS Application Programming
New York University	Summer 1978	Certificate program in COBOL &

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Employment History

11/93-now *Advanced Decisions Inc., New York, NY*

Senior Applications Consultant and Chief Financial Officer.

Current contract with CitiBank, N.A. Design and coding of batch messaging system from the mainframe to the distributed Dec Alpha system running Oracle under Unix. Wrote the messaging language interface translation and encoding software, demographic conversion modules.

Prior project with Smith Barney, a major financial and brokerage services firm. Analyzed, designed, and implemented a flexible target marketing database system to eliminate dependencies on external vendors. The system involved client-server interface in Metaphor, intersystem connectivity between DB/2 on the main frame and SyBase under AIX on an RS/6000.

Chief technical advisor and developer of Passkey® relationship analyzer and decision support software with the Relational Systems Group, Inc.

10/90-11/93 *Advanced Decisions Inc., New York, NY*

Senior Applications Consultant and Chief Financial Officer.

Primary contract with CT Corporation, a major firm providing commercial software for online access to legal information services. Responsibilities included project

management, analysis, design, and implementation of the Name Search Engine for an integrated micro-mainframe commercial product with GUI front end interface. Designed the CICS/CSP/DB2 user interface and data warehouse control programs. Supervised a team of three programmers for coding the data collection and online systems. Primary responsibility for documentation and product delivery. Worked with Data Administration on the physical and logical data base design, and with the microcomputer team on the object-oriented PC interface. Other projects: development of ZIP+4 Postal encoding, address parsing software, householding software, and rapid text retrieval applications.

05/87-09/90 Advanced Decisions Inc., New York, NY

Senior Consultant.

Under contract with the Development Division of CitiBank, NA.

Intense design and enhancement of cross-business MIS database, development of Mainframe to PC data links. Designed and coded Household Movement Analysis system. Designed, implemented, and maintained the foreign & domestic Name/Address parsing system and account analysis for Marketing Decision Support. Worked on the team to create a bank-wide, cross-division database (Teradata DBC).

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06/81-06/85 Generation Sciences, Inc.

Senior Analyst/Consultant.

Life-cycle responsibility for design, coding and implementation of the Custodial Compensation System for the New York City Board of Education. Led the design team of six people, from heavy involvement with union/management negotiations to completion of the final system.

Management of system enhancement projects for Eastern States Bankcard Association, including Credit Card Reissue, Hot Card tracking, Management Reporting.

Primary involvement in the design and coding of the unified Credit Credit Card Issue/Reissue system.

10/78-06/81 Generation Sciences, Inc.

Programmer/Analyst. Coded CICS Online Records Retrieval for Columbia University and the Usage Charge Billing System at Western Union. Worked as a programmer on the Automated Management Control System (United Technologies) and Customer Billing (LongIsland Lighting Company).

Exhibit 15

Hardware and Software Experience

Hardware	Mainframes: IBM 30xx, 43xx, 370, 360, and Amdahl 470 v.7. Special: Teradata DBC relational database processor Micro: IBM PC (80x86 series).
Operating Systems	Mainframe: MVS/XA, MVS/ESA, VM/370, DOS/VSE PC: IBM OS/2 Warp; Linux; COHERENT (Mark Williams' Unix); PC: MS-DOS, MS Windows 3.1; Windows '95; Midrange: AIX (RS/6000).
Languages	Smalltalk/V, PARTS Workbench, Visual Smalltalk C, perl, awk, lexx, yacc, ksh scripts C370, COBOL/VS & COBOL II BAL (OS/VS & CMS Assembler) SQL, QMF, REXX OS/2 and TSO), CLIST Dialog Management Services VisPro Rexx; VisPro Reports, Rexx DLL;s
Databases	IBM DB2, OS/2 DB/2 2 IMS DB/DC Teradata DBC 1012 Paradox 3.5 and 4.0, Paradox for Windows, dbase III, dbaseIV, VSAM, ISAM, IAM.

Exhibit 15

Online Software	Goserve Web Server (OS/2); CICS/VS (with DB2, SPUFI, QMF, ProEdit, Intertest) IBM/Metaphor Data Interpretation System Teradata DBG ITEQ & BTEQ; TSO, ISPF/PDF.
Utilities & Tools	TeX & LaTeX; Unix utilities, vi editor, SyncSort (Data Utilities and Exit Routines); DFSort LIBRARIAN; CA-Optimizer, SDSF; Panvalet; CobolAid, FileAid, SHRINK/MVS; Group-1 Address Software; COBOL II Online Debugger, Xpediter Debugger, Realdbug; WordPerfect, MS Word, DeScribe, Mesa/2, Quattro Pro.
Structured Methodologies & CASE Tools	Jackson System Development (JSD/JSP), Ward/Mellor, OMT, Responsibility-Driven Design (Wirfs-Brock), Familiarity with Booch, Coad and Yourdon Object-Oriented methods.
Micro & Mainframe Communications	Internet facilities and utilities, Web Explorer, Go-Serve Web Server, FTP, IBM FTTERM, Smartcom, FileLynx, IRMA FTTSO/FTCMS, Crosstalk, QL2Fax; Packet/370; OS/2 Comm Mgr; RLink; some TCP/IP (Mainframe and PC), OS/2 Faxworks.

Exhibit 15

Professional Awards

1993 Legal Tech Product of the Year (awarded to CT Legal Information Services for the product mentioned above).

1993 MarvelLIS award for outstanding achievement (awarded by CT Legal Information Services).

1989 First Million Dollar Sales Award (from CitiBank USCB).

1986 Appreciation Award (Tarkenton Software).

Language Skills

German Reading, speaking, and writing. (Studied 1969-1970 Classical Gymnasium, Winterthur, Switzerland)

Italian Reading, speaking (working knowledge), some writing.

Turkish Reading, speaking (intermediate skills).

Other Some reading and speaking French.

Exhibit 15

Professional Associations

Association for Computing Machinery (ACM), Voting member. International Computer Professionals Association, Full member.

Sworn to on this
13th day of March 1996

s/ Dayle B. Licht
Notary Public

DAYLE B. LICHT
NOTARY PUBLIC, State of New York
No. 01-4635399
Qualified in Queens County
Commission Expires May 31, 1996

EXHIBIT 16 — SMITH AFFIDAVIT (WITH CURRICULUM VITAE), DATED MARCH 11, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No.:
93 CIV 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS, DAVID S. WHITFORD, and H. BRUCE FRANKLIN,

Plaintiffs,

– vs. –

NEW YORK TIMES CO., NEWSDAY INC., TIME INC., THE ATLANTIC MONTHLY CO., THE MEAD CORPORATION, and UNIVERSITY MICROFILMS INC.

Defendants.

AFFIDAVIT OF TIMOTHY D. SMITH

State of Ohio :
: ss
County of Portage :

Timothy D. Smith, being duly sworn, deposes and says:

STATEMENT OF OPINIONS

Based on my 28 years in journalism, which includes time spent as a reporter, editor, educator and lawyer, I state the following:

Exhibit 16

The newspaper industry has come a long way since the invention of movable type made production and widespread distribution possible. Virtually every element of the publishing business has changed except that newspapers are still printed on paper. Sometimes, after they are printed on paper, the newspapers are bound into volumes. Sometimes, copies are photographed and reduced to fit on microfilm or microfiche. Technology now also permits a story that first appeared in print to be subsequently stored in a database for later access by newspaper personnel or others. But that story is markedly different than either the bound volume or the photographically shrunken copy of the entire newspaper.

Newspapers began exploring the electronic possibilities as a way to eliminate costly, space-consuming, clip-based morgues. With this technology also came a change in attitude about access to the morgue. When they were paper-based, newspaper morgues typically were off-limits to the general public. For security reasons, only staffers were permitted access. While serious researchers were sometimes permitted limited use, there was no thought to making more widespread use of this resource because there was no profit in it. The primary reason for bound volumes or microfilm was to preserve the contents — the entire contents — of the newspaper, not improve the newspaper's revenue stream. The electronic products were more secure from tampering and, newspapers discovered, there <u>was</u> a potential for profit. Those outside the newspaper would pay for access because the electronic database was searchable in a way that was never possible for bound volumes or microfilm. But there was no thought given, in my experience, to the possible copyright implications or consequences of such a development.

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At most, there was some discussion about libel implications, since access to a libelous story might constitute republication, thus extending the statute of limitations for suit. There was certainly no industry-wide assumption that publishers had the rights they needed — from a copyright standpoint — to shift materials that had appeared in print to a database.

The version of a story that appears in print and the version that is stored in a database may, indeed, be the "same" story in the sense that they contain the same basic information. It is, however, a different work. The print version of a story is part of a collective work. The electronic product stands alone. That point is driven home in a memorandum to New York Times department heads and section editors from Kevin McKenna and Dennis Stern, dated July 20, 1995. The memo asserts that all freelancers must sign a contract agreeing to give the Times the right to reproduce in electronic form anything that is printed in the paper. Contrary to the assertions of defendants' experts, the Times apparently does not believe it has those rights by default now in the absence of any specific contract language. "We need to build a foundation today that will give us the flexibility later to create new digital publications that we cannot even imagine now," the memorandum states. It is clear that the new, digital versions of the stories are already here and the Times did not anticipate what rights it would need to make use of them.

The electronic product and the printed story are similar, but they are not the same. Further, the difference is more than merely the medium. For example, unlike the bound or microfilmed products, the electronic product is stripped of all photos and graphics. It is text only. It also usually contains

some additional data, such as a word count. The database product also lists the location of the original in the newspaper because it has been removed from the context of the printed product. Typically, "key words" are added by an editor or librarian assigned to database work to aid in future searches for this story. These words would not have appeared in the original, but they relate to the story's subject matter and serve to help searchers locate other stories on this subject. These alterations make clear that the newspaper company itself considers this a different product than the one printed on newsprint. The printed version is part of the daily product. It carries no references to earlier stories on related subjects. If there is related matter, it is in that day's paper and the reference will be to a page number in the paper. There is no way for that day's reader to scan further material printed a week ago on this subject or to see what else the newspaper has published on this same topic a year ago. But the reader of the electronic product has that capability, in part, because the original version of the story has been augmented to make it more useful to this new audience. With little effort, it is possible to list numerous other differences between the electronic product and printed stories in the newspaper. There are no display ads, classified ads or sports agate and usually no letters to the editor or syndicated columns. Much of what makes a newspaper a newspaper is missing. No photos. No graphics. No editorial cartoons. No Doonesbury. (I would imagine Mr. Trudeau would speak up promptly if his material suddenly started showing up in an electronic database, even in a text-only format.)

The audience itself is likely to change substantially as the story moves from printed version to database. Even for a

national publication such as the New York Times, there is a limited number of subscribers to its newspaper product. Their number also drops substantially outside the New York metropolitan area. But the Times' electronic customers probably span the globe. Customers of commercial on-line services such as LEXIS-NEXIS may download a Times' article from any computer equipped with a modem. Further, that customer may transfer a story from the NEXIS database to the Internet and share it worldwide with thousands, potentially hundreds of thousands, of new readers. Access to the original article has multiplied geometrically. This cannot be dismissed as a mere change in format to ensure preservation. Technology exists today to allow a newspaper subscriber to use a hand-held computer to access a satellite transmission of information from an electronic news source, filter out all the news outside the subscriber's pre-set parameters, and settle in for a few minutes perusal before shifting the machine to another function. That is more than just a difference in degree to juggling a broadsheet on the subway while trying to avoid smearing too much ink on one's hands.

As a matter of custom and practice, newspapers have acquired freelance material for one-time use without careful reliance on written contracts. Agreements typically are oral. Nor is it newspaper practice, in my experience, to attempt to acquire more rights by printing contract-like, rights-divesting language above the endorsement section on the back of a freelancer's check. The practice that I am familiar with posits that the freelancer is selling the right to publish a story in one day's print edition of the newspaper. Getting this detail in writing hasn't proved necessary because use of the story

in additional markets was presumed to be the right of the freelancer. For example, Knight Ridder Inc., which has its own wire service, typically does not use freelance material purchased by one of its papers on the wire without the freelancer's permission. According to a 1990 study of this issue by Dirk Smillie for the National Writers Union, the Boston Globe did not include freelance material with staff-produced stories sent to its on-line database. Smillie quoted an editor as saying that the paper did not believe it had the right to sell such material. He found contrary opinions at other major papers, including the Times. In fact, there was little uniformity on such issues as selling freelance material to the wire services or providing syndicated material to on-line databases. The only absolutely clear point in Smillie's study was that there was no standard practice for the newspaper industry in dealing with this issue.

BASIS AND REASONS FOR OPINIONS

1. I have been a newspaper reporter and editor for 20 years. During that time, I have had numerous occasions to work with freelance material and the issues surrounding its use. I have submitted freelance material to various publications, including the New York Times. I have also worked for the last eight years as a journalism professor, teaching reporting, editing and media law. In my capacity as an educator, I have served as an adviser to student publications and am familiar with the issues involved in making a newspaper's contents available to on-line users.

2. As a lawyer specializing in media issues, I am familiar with the basics of copyright law and its underlying goals.

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I have advised countless students and professionals on their rights in the freelance market.

SPECIFIC ARTICLES OR STUDIES I HAVE CONSIDERED IN CONNECTION WITH THIS REPORT

1. Copyright and Compensation: How on-line revenues are sparking a new debate over the use of freelance work; A report to the National Writer's Union. By Dirk Smillie, Coro Fellow, June 14, 1990.

2. Availability of electronic full-text sources: A look behind the scenes. By Anne P. Mintz, Database v16n5 October 1993.

3. "How full is full" revisited: a status report on searching full-text periodicals; databases; Cover story. By Ruth M. Orenstein. Copyright 1993 Information Access Co.

MY QUALIFICATIONS, INCLUDING A LIST OF ALL PUBLICATIONS I HAVE AUTHORED WITHIN THE PRECEDING TEN YEARS

I refer defendants to my curriculum vitae, which is attached to this affidavit.

COMPENSATION TO BE PAID TO MR. SMITH FOR THE STUDY AND TESTIMONY

I have been paid $1,500 as a retainer against a fee of $150 per hour, with the final fee dependent on the amount of time needed to complete my study and testimony.

Exhibit 16

LISTING OF ANY OTHER CASES IN WHICH MR. SMITH HAS TESTIFIED AS AN EXPERT AT TRIAL OR BY DEPOSITION WITHIN THE PRECEDING FOUR YEARS

I refer defendants to my curriculum vitae, which is attached to this affidavit.

Dated: March , 1996
Kent, Ohio

s/ Timothy D. Smith
Timothy D. Smith

Sworn to on this
11th day of March 1996

s/ Marsha L. Cheshire
Notary Public

MARSHA L. CHESHIRE
Notary Public For State of Ohio
My Commission Expires
June 25, 2000

Exhibit 16

CURRICULUM VITAE

Name: Timothy D. Smith Date: 5-26-95
Date of hire: August 1986
Current rank: Professor

EDUCATION:

Bachelor of Arts	1965	Ohio State University.
Master of Arts	1971	Ohio State University.
Juris Doctor	1977	School of Law, University of Akron.

PROFESSIONAL EXPERIENCE:

January, 1991 - present: Director, Ohio Center for Privacy and the First Amendment

August 1986 - present: Professor of Journalism, Kent State University.

July 1, 1991 - June 30, 1994: Interim director, School of Journalism and Mass Communication

January to June 1991: Law Clerk, Ohio Supreme Court, Justice Craig Wright (while on leave from Kent State)

September 1983 to May 1985: Adjunct faculty, School of Journalism, Kent State University.

September 1967 to June 1986: Akron Beacon Journal, Akron, OH.

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Positions held:

August 1984 - June 1986: Managing Editor

January 1980 - August 1984: Assistant Managing Editor

July 1977 - January 1980: Metro Editor

June 1973 - July 1977: Assistant and Associate Metro Editor

September 1967 – July 1973: Reporter

June 1966 to August 1976: United Press International,

PUBLICATIONS, EXHIBITS, PERFORMANCES:

Refereed article, co-authored with Laura M. Bartolo, Reference Librarian, Kent State University Libraries, "*Interdisciplinary Work and the Information Search Process: A Comparison of Manual and Online Searching*," College and Research Libraries, pp. 344-353, July 1993.

Refereed article, co-authored with Prof. Stanley Wearden and Prof. Jeffrey K. Smith, "*An Experiment on the credibility of Anonymous vs. Named Sources*," Newspaper Research Journal, Fall 1992.

Article, "*Big Concept, Big Plan, Big If*," Corporate Cleveland magazine, August 1992.

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Refereed article, *Job Interviewing Techniques*, College Media Advisor, Fall 1991.

Refereed paper, co-authored with Prof. Stanley Wearden, "*An Experiment on the credibility of Anonymous vs. Named Sources*," Association for Education in Journalism and Mass Communication, Boston, August 1991.

Article, "*Can Press Break Its Word?*", Cleveland Plain Dealer, *Forum Section*, March 16, 1991.

Seminar: "Cutting Edge Issues in Juvenile Court," Supreme Court of Ohio Judicial College, July 8, 1994 Cleveland; July 22, 1994, Columbus, OH

Seminar: "Ask the Experts" Recent developments in Opne Records Laws, The 1994 Ohio Media and Law Conference, Aug. 19, 1994, Columbus, OH

Seminar: "Access to public records for university newspapers; first job experiences". Rocky Mountain Collegiate Press Association, SW Texas State University, San Marcos, TX, March 8-10, 1990.

Producer, and moderator, *Northeast Ohio Faces the '90s*, WNEO-TV, Dec. 12, 1989.

Article, "For Personal Reasons", FineLine, October 1989, Louisville, KY.

Article, "*The rights of commercial utterance*", Cleveland Plain Dealer, Sept. 9, 1989.

Exhibit 16

Seminar: Panel member; "*Media Access to Judicial Proceedings*," co-sponsored by Ohio Bar Association, Ohio Newspaper Association and Ohio Association of Broadcasters, July 8, 1989, Columbus, OH.

Seminar: Newsroom Management Techniques, sponsored by the United Press International Editors Association, May 1989, Sandusky, OH.

Seminar: Legal Affairs Reporting; organized and moderated event attended by 40 reporters from Northeastern Ohio; Received grant from the Ohio Newspaper Association. April 15, 1989, Kent, OH.

Article, "*The allure of concealing information*", Cleveland Plain Dealer, *Forum Section*, April 3, 1989.

Report, 1989 Ohio Freedom of Information Report, March 1989, Cleveland Press Club.

Column, "*Open-records law in Ohio really isn't a secret.*" op-ed page, Akron Beacon Journal, Feb. 28, 1989.

Report, 1988/89 FOI Report of the Associated Press Society of Ohio, June 1988/89.

Report, 1988 Ohio Freedom of Information Report, July 1988, Cleveland Press Club.

Brief Amicus Curiae, Ohio Supreme Court, State ex rel. FOSTORIA DAILY REVIEW COMPANY vs. FOSTORIA HOSPITAL ASSOCIATION, et al., Case No. 87-102, filed March 17, 1987 on behalf of Common Cause/Ohio.

Exhibit 16

Seminar: "*Dealing with the Sensational Court Case*," discussion leader for a panel of professional journalists, lawyers, students and judges, sponsored by the Akron Chapter of Sigma Delta Chi, Society of Professional Journalists, March 8, 1987, Akron, OH.

Report, Freedom of Information Committee, APSO, June 1987

Report, Freedom of Information Committee, APSO, June 1986

Analysis, *Scott v. News-Herald*, an Ohio Supreme Court decision on libel for the Associated Press / Ohio report, September 1986

Article, Future of Journalism Education, Press Club of Cleveland, 1986 Hall of Fame Commemorative Issue, November 1986

Report, Freedom of Information Committee, Associated Press Society of Ohio, June 1985

PRESENTATIONS AT PROFESSIONAL MEETINGS:

Invited presentation: "Cutting Edge Issues In Juvenile Court." The Supreme Court of Ohio Judicial College; Cleveland and Columbus, OH, July 1994.

Invited presentation: "Trends in Mass media." Leadership Mahoning Valley conference, Warren, OH November, 1994.

Exhibit 16

Invited presentation: "Ask the Experts." Recent developments in media law; 1994 Ohio Media and the Law conference, Columbus, August, 1994.

Invited presentation: "What's New in the News Business?" Kent Rotary, Kent, OH September 22, 1992

Invited presentation: "Media Relations in the Public Sector." American Society for Public Administration (Akron Chapter), Akron, OH November 1993.

Invited presentation: "The Center for Privacy and the First Amendment" Alliance Area Democrats, Alliance, OH September 9, 1992

Invited presentation: "Rights of Privacy"; American Prospect Research Association, national convention, Reston, VA August 21, 1992

Invited presentation: "Ethics in Journalism", the Wick Lecture Series, Trumbull Campus, KSU August 10, 1992

Panel: Moderator, "Cameras in the courtroom"; annual Law & Media Conference, Columbus, OH, July 1992.

Invited presentation: "New Developments in Mass Communication", Leadership Warren, Warren, OH June 4, 1992

Panel: Moderator, "Hate Speech", School of Journalism and Mass Communication Week, Kent, OH April 29, 1992

Exhibit 16

Panel: Moderator, "Reporting Ethics", Society of Professional Journalists. Columbus, OH April 25, 1992

Panel: Moderator, "Government Conflict," Radio Television News Directors Association, Columbus, OH October 12, 1991

Invited presentation: "How to handle libel cross-examination;" Crain's Publications, Annual Editor's Meeting, Cuyahoga Falls, OH May 6, 1991

Invited presentation: Legal reporting. Ohio University School of Journalism, Athens, OH April 27, 1991

Panel: Moderator, "First Amendment -vs.- Libel;" panel discussion sponsored by Ohio Newspaper Association convention, February 14, 1991

Speech: "Access to Records", Ohio Prospect Research Network. Columbus, OH. June 1990

Panel: Moderator, "The High Profile Case", panel discussion sponsored by Ohio State Bar Association Convention, Dayton, OH May 1990

Panel: Moderator, "Ethics and Juveniles", panel discussion sponsored by Society of Professional Journalists, Akron, OH February 13, 1990

Workshop *Ohio's Open Records Law*, Ohio Prospect Research Network, Columbus, OH, October 1991.

Exhibit 16

Panel: Moderator, "*Cops Robbers and Reporters*," Radio-Television News Directors Association, Columbus, OH October 1991.

Panel: Moderator, "*Socratic Dialogue: Journalists, Their Sources and Ethical Concerns*," Akron chapter, Public Relations Society of America, Sept. 14, 1989.

Workshop, 1989 Media and the Law Conference, panelist for session on "*Practical Concerns in Covering Public and Private Judicial Systems*." July 8, 1989, Columbus, OH.

Debate: Moderator, "*Access to Ohio's Public Records*," sponsored by the Cleveland Press Club, March 31, 1989, Cleveland, OH.

Panel: Moderator, "*Tough Decisions in the Newspaper Business*," 56th annual convention, Ohio Newspaper Association, Feb. 17, 1989, Columbus, OH.

Panel: Moderator, "Implications of *Hazelwood School District vs. Kuhlmeier* for High School and Professional Journalists," two panel discussions sponsored by the Cleveland chapter of the Society for Professional Journalists, February 16, 1989, Cleveland, OH.

Workshop, "*Legal and legislative implications of Hazelwood School District vs. Kuhlmeier*; First Amendment Seminar; moderator, seminar plenary session, Ohio University, January 13, 1989, Athens, OH.

Exhibit 16

Workshop, 1988 Media and the Law Conference, chairman of session on "*Communicating More Effectively With The Media.*" Panelist for a second session on "*Open Records and The Media.*" July 30, 1988, Columbus, OH.

Debate: Moderator and organizer, "*Press Rights vs Responsibilities*," Ohio Supreme Court Justice Wright and Judge Lawrence Grey of the Fourth District Court of Appeals; sponsored by the Freedom of Information Committee, Cleveland Press Club, March, 1988, Cleveland, OH.

American Press Institute, lecture on legal problems for newspaper copy desks, Reston, VA, October 1987.

Panel: Moderator, "*Future of the Fairness Doctrine*" discussion, sponsored by the Associated Press Broadcasters, October 1987, Columbus, OH.

Debate: "*Ethical Conflicts between Journalists and Politicians*," sponsored by the Case Western Reserve University's Center for Professional Ethics, October 1987, Cleveland, OH.

Workshop: Recent developments in libel law; sponsored by the Ohio Newspaper Association; Sept. 11, Boston Heights; Sept. 18, Columbus, and Sept. 19, 1987, Dayton, OH.

Speech: "*New Developments in Ohio's Open Records Law*," Queen City Chapter of Sigma Delta Chi, Society of Professional Journalists, September 1987, Cincinnati, OH.

Exhibit 16

Freedom of Information Report, APSO annual meeting, Akron, Ohio, June 1987.

Panel: Moderator, "*The Future of Journalism Education*" panel discussion, sponsored by the United Press International Editors' Association, May 1987, Dayton, OH.

Mock Libel Trial, Organizer, Plaintiff's attorney; Press Club of Cleveland, Cleveland, OH, March 1987.

Mock Libel Trial, Organizer, Plaintiff's attorney, APSO annual convention, Columbus, OH, June 1986

Freedom of Information Report, APSO annual meeting, Columbus, Ohio, June 1986.

Speech: "*Editorial Excellence*,"; Ohio Newspaper Association convention, February 1986, Columbus, OH.

Speech: "*The Akron Media Market*,"; Leadership Akron, Feb. 3, 1986, Akron, OH.

Freedom of Information Report, Associated Press Society of Ohio annual meeting, Columbus, 1985.

Exhibit 16

OTHER PROFESSIONAL ACTIVITIES:

Speech: "Newspapers and the First Amendment," delivered to faculty and students at the University of Akron; Oct. 15, 1986, Akron, OH.

Judge: Ohio Newspaper Association's Hooper Awards competition, February 1987.

Judge: Northern Ohio Scholastic Press Association, 1987, '88, '89, '90, '91 & '92

Judge: New England Newspaper Association annual "Best Newspaper of the Year" competition, April 1987, Boston, MA.

Speech: "Techniques of Investigative Reporting," Northern Ohio Scholastic Press Association, April 1987, Kent, OH.

Speech: Developments in Advertising Regulation in the Wake of *Posadas de la Puerto Rico vs. Tourism Company*, Canton Advertising Club; Sept. 20, 1987, Canton, OH.

Speech: *Sex and the 1988 Campaign*, Kent Rotary Club, November 1987, Kent, OH.

Panelist, "Media Coverage of the 1988 Presidential Campaign," sponsored the KSU Student Leadership Board; March, 1988.

Exhibit 16

Speech: "Libel Concerns for High School Journalists," Northern Ohio Scholastic Press Association, April 1988, Kent, OH.

Commentary, Ethical issues in the 1988 Mahoning County prosecutor's race, Channel 27, Youngstown, Oct. 10, 1988.

Commentary, Media law issues, *Open Air Forum*, WRRO-AM, Warren, OH, Oct. 4, 1989.

UNIVERSITY COMMITTEES AND SERVICE:

Member, Ad Hoc University Committee on Campus Speech Policy, October 1994 to May 1995.

Hearing Officer, University Judicial Affairs Office, 1992 - present

Member, All-University Hearing Board, 1994 - present

Member, Student Discrimination and Harassment Policy Review Committee, 1994-95

Chairman, Ad Hoc Self-study Committee, formed to oversee the preparation for a reaccreditation visit in the fall of 1990.

Chairman, Peer Review Committee, established to provide periodic evaluations of faculty teaching, 1989 to present.

Member, Curriculum Committee, School of Journalism and Mass Communication, 1988-89.

Exhibit 16

News-Editorial sequence coordinator, School of Journalism and Mass Communication, 1986-1989.

Chairman, Ad Hoc Graduate Curriculum Committee, formed by Dean Robert Powell of the Graduate College, to create a new, professional degree program for the School of Journalism and Mass Communication, 1986-89.

Adviser, *Daily Kent Stater*, 1988 to present.

Member, Journalism Publication Board, 1987.

Member, Ad Hoc Faculty Committee to explore the creation of a Journalism Publication Board to oversee the *Daily Kent Stater* and the *Burr*, 1986-87.

Member, Ad Hoc Curriculum Committee which created the merged curriculum for the merged program, 1986-87.

Member, Graduate Studies Committee, 1986 to present.

Chairman, Ad Hoc Merger Committee, appointed by Dean Thomas Barber to explore the feasibility of a telecommunications and journalism merger, 1986.

GRANTS:

Teaching/workshop grant, $88,000, U.S. Department of Education, for a six-week summer workshop in journalism for minority students, Summer, 1993.

Exhibit 16

Research grant, $2,500, Ohio State Bar Association to the Ohio Center for Privacy and the First Amendment for a statewide survey of judges, prosecutors and defense lawyers on attitudes towards courtroom photography, June 1991.

Professional development grant, College of Fine and Professional Arts, May 1990, $1,200 to research the *Cohen vs. Cowles Media* lawsuit.

Underwrite the publication of a special section of the Daily Kent Stater devoted to the 20th anniversary of May 4th. $5,000 - KSU Foundation, January 1990.

Grant from Research and Sponsored Programs in the amount of $490, Fall 1989, for use of Lexis database system in training media law students in methods of legal research.

Research University Research Council, September 1989, $490, to pay for media law honors students to research their term papers using the Lexis database in the main library.

Seminar grant, Ohio Newspaper Association, April 1989, $250, to offset cost of a program on reporting legal affairs.

Travel grant, University Research Council, June 1987, $499, to help defray travel expenses incurred as internship coordinator for the School of Journalism, making onsite visits to newspaper interns for an article on how interns are trained.

Exhibit 16

HONORS:

Fellow, Urban Journalism Center, Northwestern University, Chicago, 1969.

Mortar Board, selected for outstanding teaching, 1988.

Fellow, Poynter Institute, *Journalism Fellowship Program in Media Management*, St. Petersburg, FL 1989.

Mortar Board, selected for outstanding teaching, 1989.

PROFESSIONAL AFFILIATIONS:

Member, National Freedom of Information Coalition, 1993 to present.

Trustee, Ohio Coalition for Open Government, 1992 to present.

Member, American Bar Association, 1977 to present.

Member, Forum Committee on Communications Law, American Bar Association, 1986 to present.

Member, Associated Press Managing Editors, 1986 to present.

Member, Association for Education in Journalism and Mass Communication; Newspaper Division (Teaching Standards chairman, 1989-90), Law Division, 1986 to present.

Liaison, American Bar Association, from the Law Division, AEJMC, 1989.

Member, Associated Press Society of Ohio, 1967 to present.

Exhibit 16

Member, Ohio Bar Association; Media Law Committee

Member, Society of Professional Journalists

Member, Editorial Board, Newspaper Research Journal, 1989-present

OTHER PROFESSIONAL/SCHOLARLY ACTIVITIES:

Knight-Ridder Inc., Developmental Training Centers, management

Chairman, Newspaper Division, Association for Education in Journalism and Mass Communication, 1993-94.

Expert Witness:

Newcomb et. al. vs. The Plain Dealer, Case No. 93757, Cuyahoga County Common Pleas Court, 1990.

Murray vs. Pittsburgh Press Co., Case No. GD89-6161, Allegheny County Common Pleas Court, 1989.

Robb vs. Lincoln Publishing Co., Case No. 94 CV 35303, Brown County Common Pleas Court, 1995.

Tyson vs. The Lantern, et. al., Case No. 94-13730, The Ohio Court of Claims, 1995.

White vs. Clinton County Board of Commissioners, Case No. 93CVH228, Clinton County Common Pleas Court, 1994.

Exhibit 16

PROFESSIONAL AFFILIATIONS:

Member, National Freedom of Information Coalition, 1993 to present.

Trustee, Ohio Coalition for Open Government, 1992 to present.

Member, American Bar Association, 1977 to present.

Member, Forum Committee on Communications Law, American Bar Association, 1986 to present.

Member, Associated Press Managing Editors, 1986 to present.

Member, Association for Education in Journalism and Mass Communication; Newspaper Division (Teaching Standards chairman, 1989-90), Law Division, 1986 to present.

Liaison, American Bar Association, from the Law Division, AEJMC, 1989.

Member, Associated Press Society of Ohio, 1967 to present.

Member, Ohio Bar Association; Media Law Committee

Member, Society of Professional Journalists

Member, Editorial Board, Newspaper Research Journal, 1989-present

EXHIBIT 17 — EDGERLY AFFIDAVIT, DATED MARCH 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No.:
93 CIV 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS, DAVID S. WHITFORD, and H. BRUCE FRANKLIN,

Plaintiffs,

– vs. –

NEW YORK TIMES CO., NEWSDAY INC., TIME INC., THE ATLANTIC MONTHLY CO., THE MEAD CORPORATION, and UNIVERSITY MICROFILMS INC.

Defendants.

AFFIDAVIT OF LINDA EDGERLY

State of New York :
: SS
County of New York :

Linda Edgerly, being duly sworn, deposes and says:

I have previously provided the plaintiffs in Tasini with a report for their use in accordance with Rule 26(a)(2)(C) of

the Federal Rules of Civil Procedure, setting forth the basis for my opinion that NEXIS' electronic on-line information services and University Microfilm, Inc.'s text-only CD-ROM products are not "archives," but "databases." I now reaffirm the opinion I expressed in that report in affidavit form.

OPINION AND BASIS FOR OPINION

The following statements and opinions are based on my experience over a period of 24 years in the field of archives and documentation management, as well as on: (a) information gained through continuing education opportunities in my profession; (b) reading current professional literature; (c) extensive and current activity in professional organizations serving those engaged in archives management; and (d) review of Rule 26 expert reports submitted on behalf of the defendants and other documents related to this case.

I have not previously served as an expert witness. For my report and testimony I will be compensated at a rate of $150 per hour.

I am a consulting archivist and Director of the Information & Archival Services Division of The Winthrop Group, Inc., a consulting firm headquartered in Cambridge, Massachusetts. My work as a consultant began in 1979, subsequent to experience in a state archives, a University-based oral history archives, one private family/fiduciary business archives, and two corporate archives. Since 1979 I have worked with over 100 corporations and non-profit institutions and organizations as well as private archival

collections. Currently I supervise a staff of 11 consultants and project archivists working on evaluations, archival program initiatives, various aspects of implementation, records retention scheduling and special research and publication support projects, etc. My clients and publications are detailed in my resume. I have been an active member of the Society of American Archivists (SAA) since 1973. I have served in various capacities for SAA and am a Fellow of the Society. Also, I am a long-time member of the Mid-Atlantic Regional Archives Conference, the Archivists Roundtable of Metropolitan New York, and the Northwest Archivists. I am certified by the Academy of Certified Archivists (ACA).

The work of an archivist has been defined in the professional literature, including in the standard reference utilized by archivists, A Glossary for Archivists, Manuscript Creators, and Records Managers (Chicago: The Society of American Archivists, 1992)[1], as follows: The archivist is "a person professionally educated, trained, experienced, and engaged in the administration of archival materials, including the following activities: appraisal and disposition, acquisition, preservation, arrangement and description, reference service, and out-reach. In the United States, the term also frequently is used to refer to a manuscript curator." [Lewis J. Bellardo and Lynn Lady Bellardo — compilers, A Glossary for Archivists, Manuscript Curators, and Records Managers (Chicago: The Society of American Archivists,

1. This source is considered a reliable standard in the profession because of the experience and credentials of its compilers, the high quality of their research, and the fact that the editorial review process of SAA, helps to ensure the accuracy and viability of works the society publishers.

1992), pp. 3-4.] While archivists generally are charged with management of primary source materials, they frequently have responsibility for secondary sources relating to or in some way supporting the materials and information in the archival collections.

Although I am not a search expert, I am generally familiar with databases such as NEXIS, having commissioned data searches for research related to my work.

I have reviewed the Rule 26 reports submitted by Ralph Oman, Harold W. Fuson, Jr., and Alan J. Hartnick. I address my report to two issues raised by these experts: (a) the description of NEXIS and of CD-ROM products derived from or based on NEXIS as "digital archives" or as material distributed to "archival markets"; and (b) the contention that NEXIS or CD-ROM products derived from or based on NEXIS are "replicative formats" that are "similar to microform."

Harold W. Fuson, Jr., in his report, refers to the NEXIS database and to CD-ROM derivatives or knock-offs of that database as "digital archives." He suggests that through these vehicles newspaper publishers "publish and distribute editions of their newspaper to archival markets such as libraries and researchers." Contrary to Mr. Fuson's assertions, the NEXIS database and the CD-ROM format of that database are not archives and cannot legitimately be said to be distributed to "archival markets." Though the term "archives" is sometimes used in the electronic environment to refer to electronically stored raw data, the NEXIS database and the CD-ROM format of the database, in fact, meet none of the criteria of a true archives.

Exhibit 17

Archivists employ optical (e.g., microfilm or microfiche), magnetic, and sometimes electronic technologies to store documentary material or information. They do so in order either to preserve the information and/or images that are contained in documents and records and/or to reduce the wear and tear on originals. They do so in many instances because the original documents made use of ephemeral (e.g., high acid papers) or volatile media (e.g., nitrate film) which either would deteriorate to a point at which it could no longer be used or would disintegrate altogether. If records are electronic in format, they are sometimes retained electronically if their integrity can be preserved. Archivists do not employ these technologies in order to manipulate the original information within original archival material (i.e., primary sources) or to create new informational products from primary or secondary sources. Indeed, archivists are charged under the "Code of Ethics for Archivists" with ensuring the physical and intellectual integrity of materials in their collections. Alterations in physical formats are usually confined to those necessary for preservation or distribution of the actual image of a document.

The fact *per se* that material is stored or preserved by means of optical, magnetic or electronic technologies does not imply that the material is part of an archives. Archives are defined as follows: "1. The documents [or records regardless of format or medium] created or received and accumulated by a person or organization in the course of the conduct of affairs, and preserved because of their continuing value. Historically, the term referred more narrowly to the noncurrent records of an organization or institution preserved because of their continuing value. 2. The building or part of a building where archival materials are located; also referred

to as an archival repository. 3. The agency or program responsible for selecting, acquiring, preserving, and making available archival materials; also referred to as an archival agency, archival institution, or archival program." [Lewis J. Bellardo and Lynn Lady Bellardo — compilers, A Glossary for Archivists, Manuscript Curators, and Records Managers (Chicago: The Society of American Archivists, 1992), p. 3.]

An archives preserves primary source records generated in the course of business or as a means of carrying out activities. Though archives might include some secondary source materials that pertain to the archival records, such as, for example, a newspaper clipping that is part of a collection of letters or papers, archives do not make a business of collecting secondary source material.

The National Archives, for example, includes documents considered appropriate for preservation by the federal government as evidence of its organization, functions, policies, decisions, procedures and transactions. Permanent records or archival records of the federal government are those appraised as having sufficient historical or other enduring value to warrant continued preservation beyond the time they are needed for administrative, legal or fiscal purposes. A database allowing access to selected published records, or even archival records, of the federal government, however, would be described as a catalog or finding aid, not an archives, unless an image of the original document is visible on a computer screen.[2]

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2. The mere fact alone, however, that an image of the original document is visible on the computer screen, does not necessarily make it an archives.

Exhibit 17

The definition of "database" utilized most commonly in education and literature within the archival profession is "Data organized and stored so that it can be manipulated or extracted to meet various applications but managed independently of them." [Lewis J. Bellardo and Lynn Lady Bellardo — compilers, A Glossary for Archivists, Manuscript Curators, and Records Managers (Chicago: The Society of American Archivists, 1992), p. 9.]

An archives is not something created in and of itself for commercial purposes. Nor is archived material manipulated, processed or altered in order to create a new information product. NEXIS and CD-ROM products derived from or organized in the same fashion as NEXIS, permit reorganization and selection of data, including articles previously published in periodicals, for a commercial purpose. Material prepared for inclusion in the NEXIS database is not selected or formatted for NEXIS for purposes of historic preservation, but in order to respond to different commercial purposes not related to original publication for a readership.

Messrs. Oman's, Fuson's and Hartnick's attempts to equate the inclusion of material from print publications in a NEXIS database or text-only CD-ROM product with preservation initiatives which replicate the original form, feel, and contents of publications on microfilm and microfiche are not tenable. Indeed, each of their attempts to equate them, including the following examples, must be rejected.

In his Rule 26 Report, Ralph Oman states: "In the years preceding the 1976 Copyright Act, newspaper and magazine

publishers also made Congress aware that computer databases and technological developments would allow the reproduction and storage of newspapers and magazines in electronic formats similar to microform." He also refers to "replicative formats such as microform, electronic databases (e.g., NEXIS), CD-ROM and others. . . ."

In his Rule 26 Report, Harold W. Fuson, Jr., alleges that newspapers have been preserved in a variety of forms and formats, including bound volumes, microfilm and microfiche editions, and equates these preservation formats with publication "in digital formats for distribution on-line," as well as with publication and distribution "in magnetic and optical media, such as CD-ROMs."

In his Rule 26 Report, Alan J. Hartnick refers to the rights he says the magazine industry has relied on to allow magazines to publish and distribute issues in microfilm and microfiche formats. He says further that since the early 1980s, the industry also has relied on such rights to include the text of magazines as part of databases such as NEXIS, and more recently, to permit publication of back issues of magazines in CD-ROM formats.

These experts are fundamentally mistaken when they equate the replicative formats of microfiche and microfilm with the non-replicative formats of the on-line NEXIS database and the database in CD-ROM format. Microfilm and microfiche are optical images in which the visual image of the document as it appeared originally is stored and reproduced, albeit often without color. The resulting image is one generation away from, but preserves the appearance of, the original.

Exhibit 17

Though digital and other technologies can be replicative — CD-ROM and optical disks, for example, can store both images and text — the text-only CD-ROM edition of the database, in common with the on-line NEXIS database, neither reproduces nor preserves the back issues of a publication in its original form. Rather, it provides selected information from the original material for commercial dissemination and distribution, republishing the altered material in a different format and venue. The procedures that are employed to transform an article that appeared in print as part of a newspaper or magazine into an isolated electronic file often edited, devoid of graphics and illustrations, and coded so that it can be retrieved by topic, theme or key words are not appropriate to the creation of an archives of the periodical as a whole. They are designed to create a commercially marketable product, i.e., a text-based and text only database that is searchable in a great number of ways.

In the case of secondary sources, such as newspapers and magazines, much of the value of the publisher's work lies in the assemblage of the whole. This point was made very clearly by Anne P. Mintz in her authoritative article on electronic full-text sources in the October 1993 edition of Database, "Availability of Electronic Full-Text Sources: A Look Behind the Scenes." As she noted there, "[p]ublishers and editors spend a great deal of time and money visually arranging the copy of a text, whether a book or a journal article. In many cases the layout is actually part of the editorial content — a revealing chart, photograph, or even an unusual page layout will have informational or entertainment value." Preservation of that "arrangement" or "layout" intact, as it originally appeared serves the archivist's

goal and can be achieved only using microform electronic imaging or other technology that similarly replicates the look and the feel of the whole work.

By contrast, articles prepared for and placed in an on-line database or CD-ROM version of a database are not there as part of the "back issue" (archival copy) of the periodical. In fact, the "back issue" does not appear in the database as it would in microfilm or microfiche or in an electronically scanned image of the whole. Even in "cover-to-cover" or "full-text" offerings in NEXIS, the original publication from which material has been selected is *not* replicated.

It follows from this fact that the phrase "cover-to-cover" in the on-line world is not to be misinterpreted as being "archival." Archival copies of periodicals would include display and classified advertisements, stock quotations, filler material, announcements, meeting calendars, indexes, legal notices, photographs, complete graphs and charts and illustrations. This has not been true of on-line databases, which until only recently, and even now generally, eliminate these materials. The archival copy of the periodical also would include editorials, obituaries, short articles, tables, correction notices, reviews, wire service stories and syndicated columns, elements which are only sometimes present in on-line databases. [Ruth M. Orenstein, " 'How Full is Full' Revisited: a Status Report on Searching Full-Text Periodicals," Full Text Sources On-line, (Needham, Mass.: Bibliodata), January 1993]

Historical preservation is not one of the factors that guides the selection of material for placement in the NEXIS database.

Exhibit 17

In conclusion, the NEXIS database and the database on CD-ROM are not archives, nor are they similar to microform or other visual formats which replicate and preserve the historical record. They represent a different product, serve a different market and produce for a different venue the secondary source material that originally appeared in print periodicals.

Dated: March 13, 1996
New York, New York

s/ Linda Edgerly
Linda Edgerly

Sworn to on this
13th day of March 1996

s/ Jennifer Blinn
Notary Public

Jennifer Blinn
Notary Public for State of New York
No. [illegible]
Qualified in New York County
Commission Expires January 3, 1998

EXHIBIT 22 — RESPONSES AND OBJECTIONS TO REQUESTS TO ADMIT ADDRESSED TO DEFENDANTS NEWSDAY, INC. AND LEXIS/NEXIS, pp. 7, 23

[7] * * *

13. Please admit that when an article that originally appeared in Newsday is received from an on-line service such as NEXIS, other articles and graphic elements that appeared together with the article in the newspaper are missing.

Response: Newsday and LEXIS/NEXIS object to Request 13 on the grounds that the phrase "graphic elements" is ambiguous and subject to misinterpretation. Newsday and LEXIS/NEXIS admit that it is possible for an end user to retrieve an article from NEXIS without also retrieving other articles which appeared together with the retrieved article in the print edition of a publication. Request 13 otherwise is denied.

[23] * * *

71. Please admit that the NEXIS program allows customers to access, browse, down-load or print out articles related to a specific topic from a variety of different newspapers and other sources in a single search.

Response: Newsday and LEXIS/NEXIS object to Request 71 on the grounds that the term "NEXIS program" is ambiguous and subject to misinterpretation. Newsday and LEXIS/NEXIS admit that it is possible to use the NEXIS service in ways that, among other things, permit customers

to access, browse, down-load or print out articles related to a specific topic from different newspapers and other sources in a single search. Request 71 otherwise is denied.

* * * *

EXHIBIT 23 — RESPONSES AND OBJECTIONS TO REQUESTS TO ADMIT ADDRESSED TO DEFENDANTS TIME AND LEXIS/NEXIS, pp. 18-19

[18] * * *

55. Please admit that these TTI's are inserted and/or embedded in the electronic text of an article in order to facilitate the location and retrieval of the article by a NEXIS user.

Response: LEXIS/NEXIS admits that, without altering the text of an article in any way, it links TTI terms to certain articles in order to facilitate the location and retrieval of those articles by NEXIS users.

[19] * * *

57. By the same token, please admit that the NEXIS user will not retrieve copies of the complete periodicals or indeed even of other articles that were physically contiguous to the articles that have been retrieved.

Response: Time Inc. and LEXIS/NEXIS object to Request 57 on the grounds that the Request is unclear, ambiguous and subject to misinterpretation. LEXIS/NEXIS admits that it is possible for a NEXIS subscriber to retrieve one article from a particular issue of a periodical without retrieving other articles from that same issue. Time Inc. and LEXIS/NEXIS otherwise deny Request 57.

* * * *

EXHIBIT 31 — RULE 30(b)(6) DEPOSITION OF PATRICK M. GUIANT, DATED APRIL 13, 1995, pp. 1, 53-56, 80-81

[1] * * *

April 13, 1995 11:00 a.m. Deposition of PATRICK M. GUIANT, held at The Law Offices of Emily Bass, Esq., 330 Madison Avenue, New York, New York, pursuant to Notice before Sheril Feldman, a Notary Public of the State of New York.

* * *

[53] **Q.** How are the results of a user's search displayed on a terminal screen?

A. There is, they put in if they are doing Boolean logic, they put in the Boolean search. They run the search. Basically, it repeats what they put in. It puts a number to the side of it that says how many occurrences on that CD they found of that Boolean search.

Q. Do the number of occurrences equate with articles in which the keywords have appeared?

A. Correct.

Q. Once the number of occurrences is displayed on the screen, does the user have options as to how he or she wishes to display the material?

A. No.

Q. Then how is the material displayed?

A. They would highlight the thing with the number, hit the enter key on the computer and it would sequentially display in reversed chronological order all of the articles that were referenced in that number.

Q. Does it first display a list of [54] citations?

A. Not complete citations. There is a — the list that it would give you would basically be the date and the article name, the name of the article and, I believe, the author.

It is all the electronic envelope information. As much as would be practical would be displayed on the screen, and that is in a list form.

Q. And you believe that each item on the list contains the date, the name of the article and the author?

A. I believe so.

Q. Any additional information, to the best of your recollection?

A. Not to best of my recollection.

Q. Is each individual article assigned a number on the list?

Exhibit 31

A. No, but it is in reserve chronological order.

Q. Can the user select one article from the list to display?

A. Yes.

Q. So the user does have an option to [55] display less than all the articles sequentially; is that correct?

A. They don't have the option to display less than all of the articles, but they can highlight an individual one on the list, which would be five or six on the screen, and they could go to that article. And then the articles are sequential. They have to scroll down or they have to return to the list, pick another one off the list.

So if you have four articles on the list, and let's call them, for example, let's call them A, B, C and D, and say what you were searching for was an author by the name of Will, and articles in The New York Times that were done by an author by the name of Will and you weren't very specific, one would say Will Rogers, perhaps, and one would say, Jonathan Will.

Of if you knew that you didn't want Will Rogers, you could highlight Jonathan Will and it would show you that article. But if that was article B and you now wanted to see article D, you would have to go back to the list and pick article D because if you just keep scrolling down [56] on the computer, you would see it in the sequence of how it was presented on the screen.

Exhibit 31

Q. Let me go back and see if I understand.

Once the list of citations is displayed, the user can select a particular article that he wishes to display; is that correct?

A. Correct.

Q. Does he then have two options, one, to continue scrolling down the screen and see the subsequent articles sequentially, or, two, to return to the list and select a different article?

A. Correct.

* * *

[80] * * *

Q. Is there a search option on the full-text New York Times CD-ROM that would enable a user to bring up an entire issue of The New York Times?

MR. KELLER: Objection to form.

A. I don't quite understand what you are asking.

Q. You testified earlier, I believe, that there are two search options that a user — they either can do a Boolean search or do a topical search.

A. Correct.

Exhibit 31

MR. KELLER: Are you asking if there [81] is an issue of CD-ROM which contains back issues of The New York Times for any certain period by entering the date search, or some other command, to retrieve the full text of a day's issue of The New York Times?

MS. BASS: I will agree to start with that question.

A. Yes, they can.

Q. How would they do that?

A. Through a date search, and it will pull up all of the articles' text for that particular day.

Q. Would the screen show that there was one occurrence of the item searched for or more than one occurrence?

A. The screen would show that there is, if you will, multiple occurrences because it is measured in how many times it hit in each one of those articles, it hit those envelopes on the outside. So the system would count the number of envelopes.

Q. So the number of hits would correspond to the number of articles in that particular issue bearing that date?

[82] **A.** That's on that CD-ROM, correct.

Q. Correct?

A. Correct.

* * * *

EXHIBIT 33 — RULE 30(b)(6) DEPOSITION OF JAMES E. PATTERSON, DATED APRIL 6, 1995, pp. 1, 3-4, 18-19, 57

Deposition of JAMES E. PATTERSON, held at The Law Offices of Emily Bass, Esq., 330 Madison Avenue, New York, New York, pursuant to Notice, before Sheril Feldman, a Notary Public of the State of New York.

[3] * * *

State your full name and address for the record.

A. James E. Patterson, 78 Ridgedale Avenue, Madison, New Jersey 11566.

Q. By whom are you employed?

A. New York Times.

Q. In what capacity?

A. I am the vice president of business information services within The New York Times Service Group.

Q. What are your duties in that capacity?

A. Primarily to look after the creation [4] and the marketing, distribution and so on of electronic New York Times-based services that are aimed at the institutional market, in general, businesses and other organizations.

* * *

Exhibit 33

[18] * * *

Once having been input into the system, using whatever means are used for that, articles are stored as text files on the system.

Functionally, the system can be thought of as a large-scale multi-user word processing system, in a real sense, to which a [19] device is attached, that is able to produce hard copy with the requested format, typefaces, et cetera, which is what is done.

The hard copy is then laid out manually, which is the composing room process, and it is from that layout that the page is created.

Q. The paper is laid out manually, did you say?

A. Yes.

* * *

[57] * * *

What happens is that a, the text files that originate on the ATEX system and that make their way through the processes that I have described to NEXUS are output by the ATEX system to a typesetter, or a very elaborate printer, that generates the necessary formats and so on that go into the makeup of a page.

The nontext elements of the page, which originate elsewhere from the ATEX system, are then added to that

page manually, and the page itself is at some point then completed, and it is scanned by a very elaborate machine that is functionally something like a copying machine. And it is transformed into its digital equipment, bits and bites and so forth, and transmitted to a printing site.

In a nutshell, that's kind of a high-level view of how that process works.

* * * *

EXHIBIT 34 — RULE 30(b)(6) DEPOSITION OF RICHARD PETROSINO, DATED APRIL 14, 1995, pp. 1, 126-130, 132

[1] * * *

April 14, 1995 9:05 a.m.

Deposition of RICHARD PETROSINO, held at The Law Offices of Emily Bass, Esq., 330 Madison Avenue, New York, New York, pursuant to Notice, before Sheril Feldman, a Notary Public of the State of New York.

[126] * * *

Q. Let us assume for a moment that a customer sits down at his or her PC and requests that a search be conducted on NEXIS for the keywords Atlantic salmon, can you tell us how the results of that search will be displayed on the customer's screen?

A. Again, it will be displayed however the customer chooses to have it displayed.

Q. Will the customer be informed in the first instance of how many documents in which those keywords appear?

A. Yes.

Q. Once that number is displayed, the customer is given the option of choosing one of these display formats; is that correct?

[127] **A.** Yes.

Exhibit 34

Q. If the customer selects the site format, then only the various segments that you listed before will appear on the screen, correct?

A. Yes.

Q. Let us assume for the moment that seven documents have been found searching magazines and newspapers containing the keywords Atlantic salmon. Once the customer selects the site format, the citation to those seven documents will appear on the screen, correct?

MS. MARKOFF: Objection to form.

Q. Then let me try to rephrase the question.

If there have been seven hits, and I believe that's the word that a previous witness has used, when the customer selects site format, those seven hits will appear on the screen, correct?

A. Yes.

Q. Each of those hits corresponds to an article in some newspaper or magazine, correct?

A. Yes.

Q. Let us assume that one article is in [128] Newsday, one article is in Sports Illustrated, one article is in The Washington Post, one article is in The Atlantic Constitution.

If the customer decides that they wish to read the Atlantic Constitution article, can they go to that citation on the screen and click on that individual citation?

Exhibit 34

A. I don't know.

* * *

[129] * * *

Q. Let's go back for a moment.

I thought that when the customer did a search for Atlantic salmon and seven hits were recorded by NEXIS, each of those hits corresponded with an article in some newspaper or magazine, correct?

A. Yes.

Q. The customer then, you said, could select one out of the seven to display in full, correct?

A. Yes.

Q. When the customer selects The Atlantic Constitution site to then display in full format, [130] I was asking what would be displayed on the screen. You said, I believe, that the —

A. Full article.

Q. You said the full article plus the headline and byline and copyright and other initial segments; is that correct?

A. Yes.

Q. Will the entire issue of The Atlantic Constitution in which that articles appeared be displayed on the screen?

A. No.

Exhibit 34

Q. Once the customer displayed that article on the screen, can they then download that to their computer?

A. Yes.

Q. Can they print it out on their local printer?

A. Yes.

Q. Could the customer, given the search and search results we have just been discussing, download a copy of the entire issue of The Atlantic Constitution in which that article appeared?

A. No.

* * *

[132] * * *

Q. Is there any way that a customer can bring up an entire issue of The Atlantic Constitution as one hit or is an entire issue of The Atlantic Constitution going to come up as, let's say, 81 hits, corresponding to the 81 articles in the individual issue?

A. You have two questions there in the second half, and yes.

Q. Yes, what?

A. They will come up as separate hits.

Q. They will come up as separate hits corresponding to the separate articles in the one issue, correct?

A. Yes.

* * * *

EXHIBIT 35 — RULE 30(b)(6) DEPOSITION OF MARY ANNE SKINNER, DATED APRIL 6, 1995, pp. 1, 35-36, 38, 60-61, 63-65, 67

Deposition of MARY ANNE SKINNER, held at The Law Offices of Emily Bass, Esq., 330 Madison Avenue, New York, New York, pursuant to Notice, before Sheril Feldman, a Notary Public of the State of New York.

* * *

[35] Q. When the files arrive in ASCII at the library, have they already been through the composing room?

A. No. It is a copy of what goes to the composing room.

Q. It is a copy of what comes out of the layout department? One copy of what comes out of the layout department is sent to your department and one copy is sent to the composing room?

A. Yes.

* * *

[36] Q. The composing room then gets graphics from the art department and merges those graphics with the text that it has received from the layout department; is that correct?

A. Yes.

* * *

Exhibit 35

[38] * * *

Q. Do the files that you receive in your cue have any type of typesetting instructions in them?

A. No.

* * *

[60] * * *

A. A copy of each story goes from the layout system to the composing room and a copy goes to the library cue.

The composing room merges the text and the graphic elements, then films it. It goes to plate and is printed.

* * *

[61] * * *

Q. You're saying that the same version that goes to composing from layout goes to the library system; is that correct?

A. Yes.

* * *

[63] * * *

Once all the day's stories are together on the ATEX system, files are then loaded onto the VAX system?

Exhibit 35

A. Actually, no. As somebody in the library finishes working on a story, it is copied over into the VAX system. It is not necessarily a batch.

* * *

[64] * * *

Q. So it is kind of a continuous process. Somebody in your department works on an individual file on the ATEX system, finishes encoding it, the spooling function takes over and that file is transferred over to the VAX system?

A. It is transmitted to the VAX system.

Q. Transmitted to the VAX system?

A. Yes.

Q. When that file is fed to the VAX system, is it added to what you referred to as the electronic library or on the VAX system?

A. Yes, that's done as a batch.

Q. That's done as a batch?

A. Yes.

Q. So when files are fed to the VAX system, they are stored somewhere on the VAX [65] system until all of the day's stories are on the VAX system and then what you have referred to as the electronic library is updated?

Exhibit 35

A. Yes.

Q. At what point in this process does the VAX system transmit the day's data to Mead?

A. 2 a.m.

* * *

[67] * * *

A. And so the program, it is an automatic program that sends it to Mead.

* * * *

EXHIBIT 40 — EXCERPT FROM MEAD-NEWSDAY CONTRACT (M003717), ¶ XIV

XIV. NO AGENCY

Nothing in this Agreement shall be construed to constitute or appoint either party as the agent or representative of the other party for any purpose whatsoever, or to grant to either party any right or authority to assume or create any obligation or responsibility, express or implied, for or on behalf of or in the name of the other, or to bind the other in any way or manner whatsoever.

EXHIBIT 41 — EXCERPT FROM MEAD-TIME INC. CONTRACT (T000017), ¶ XIII

XIII. NO AGENCY

Nothing in this Agreement shall be construed to constitute or appoint either party as the agent or representative of the other party for any purpose whatsoever, or to grant to either party any right or authority to assume or create any obligation or responsibility, express or implied, for or on behalf of or in the name of the other, or to bind the other in any way or manner whatsoever.

EXHIBIT 49 — DESCRIPTION OF NEWSDAY OFFERINGS ON NEXIS FILE (M002018-M002019); CONTENTS OF NEXIS (M003166-M003169, M003171-M003184; LEXIS/NEXIS PROMOTIONAL MATERIALS (M003220)

M002018

Newsday
NEWSDY

CONTENT SUMMARY:
Newsday, the sixth largest daily newspaper, is known for its extensive Newsday focus on national issues, however, frequently feature stories provide coverage ranging from banking and financial services, key executive appointments, real estate, and technology trends. Newsday offers a variety of daily theme sections including Business, Sports, Food, Home, Real Estate, Discovery and Viewpoint. In addition, feature columns are provided by three Pulitzer prize winners.

FILE OVERVIEW:	
LIBRARY NAME(S):	NEXIS
FILE NAME:	NEWSDY
NEXIS GROUP FILES(S):	OMNI;CURRNT;ARCHIV; MAJPAP;PAPERS; NEAST;NEWS
PUBLICATION TYPE:	Newspaper
AVAILABILITY:	Usually within 24-48 hours of publication date
FREQUENCY:	Daily, Monday – Sunday
COVERAGE:	From January 2, 1988

Exhibit 49

PUBLISHER:
Newsday, Inc.
235 Pinelawn Road
Melville, NY 11747

SPECIAL EXCLUSIONS: Advertisements, legal notices, weather forecasts, selected syndicated materials and freelance materials, sports polls, rosters, sports statistics, sports schedules, racing picks, charts, bets, money-rate tables

SAMPLE DOCUMENT: SEGMENTS:

Copyright 1992 Newsday, Inc. Newsday	PUBLICATION
July 1, 1992, Wednesday, NASSAU AND SUFFOLK EDITION	DATE
SECTION: SPORTS; WIMBLEDON; Pg. 150 Other Editions City Pg. 1239	SECTION
LENGTH: 678 words	LENGTH
HEADLINE: The King of England; Underdog Kac gains popularity	HEADLINE
BYLINE: By Pat Calabris, STAFF CORRESPONDENT	BYLINE
DATELINE: Wimbledon	DATELINE

Exhibit 49

KEYWORD:
TENNIS; WIMBLEDON;
JOHN MCENROE

KEYWORD

BODY:

BODY

This is the place where he spat out the famous line, "You are the pits of the world," to an umpire, where he was once spurned for automatic membership in the All England Club, and where his tossed rackets often fell like raindrops. So now John McEnroe serves as the best example that times do change.

He used to be "Mac the Knife" or "McBrat" in the newspapers — and worse in the whispered breath of Wimbledon officials. He was a favorite target of the spectators provoked to unbottle their restraint.

And these days, the fans applaud wildly and the headlines have been happily repeating the pun, "That Old Mac Magic" all week.

"I feel like over the years the crowd's reaction has gotten a lot better, . . .

4-N17

June 1992

Exhibit 49

M002019

SEGMENT DESCRIPTIONS

BODY	*body(XXXX W/10 YYY)* That part of a document which follows the LEAD
CORRECTION:	*correction(XXXX)* The text of a published correction.
BYLINE:	*byline(XXXX)* Person(s) identified as the author/reporter
CORRECTION -DATE:	*correction-date = 1991* The date when a correction was added to a story.
DATE:	*date = 1992* Arithmetically searchable and sortable.
DATELINE:	*dateline(XXXX)* Location of the story or where it was filed.
GRAPHIC:	*graphic(XXXX)* The type of graphic accompanying the document.

Exhibit 49

HEADLINE:	*headline(XXXX)* Not every document in this file has a headline.
HLEAD	*Head(XXXX and YYYY)* Group segment of LEAD and HEADLINE
KEYWORD	*keyword(XXXX)* An index term added to the document by the information provider
LEAD	*lead(XXXX)* Approximately the first 50 words in a document.
LENGTH:	*length > 100* Automatically searchable and sortable.
PUBLICATION	*publication(XXXX)* The name of the publication.
SECTION	*section(XXXX)* Sections frequently in this publication are listed at SPECIAL CHARACTERISTICS
SERIES:	*series(XXXX)* Name or number of a series including the document

Exhibit 49

SPECIAL CHARACTERISTICS

The following briefly describes a sampling of some major SECTIONS in Newsday.

AT HOME — Covers materials published in the At Home section.

BUSINESS — Includes all business and financial materials published in the business sections as well as other parts of the paper.

CITY LIVING — Provides information on home improvements, gardening, apartment living and other items.

HOLIDAY ALMANAC — Appears around the Christmas season as a special section.

NEWS — Includes all general news stories from all editions.

SPORTS — Includes all sports stories seven days a week.

VIEWPOINT — Contains opinion pieces and letters from readers and editorial staff.

DATE SEGMENT:
The date segment will contain the date of publication and the edition. Although the primary editions in the NEWSDY file are the Nassau and Suffolk Country editions, the following is a complete list of possible editions:

Exhibit 49

BROOKLYN (NYC REGIONAL)
BROOKHAVEN (SUFFOLK REGIONAL)
CITY
CITY HOME
EAST END (SUFFOLK REGIONAL)
HOME
MANHATTAN (NYC REGIONAL)
NASSAU
NASSAU AND CITY
NASSAU AND HOME
QUEENS (NYC REGIONAL)
SUFFOLK
SUFFOLK HOME
SUFFOLK AND CITY
NORTH SHORE (SUFFOLK REGIONAL)
SOUTH SHORE (SUFFOLK REGIONAL)

Contents of NEXIS

M003166

ALPHABETICAL LIST 1

Title	Library Name	File Name	Coverage From
A			
A.G. Edwards & Sons, Inc.	COMPNY INVEST	AGE	11/88
ABA Banking Journal	BANKS NEXIS	ABABJ	1/80
ABC News Transcripts	NEXIS	ABCNEW	1/90
Abortion Background News***	BACKGR	ABORT	Current
Accounting literature – current and superseded	BANKNG	LIT	1934
	BANKING	SLIT	
	BKRTCY	LIT	
	BRKTCY	SLIT	
	FEDTAX	ALL	
	GENFED	ALL	
	NAARS	LIT	

Exhibit 49

Exhibit 49

	NAARS	SLIT	
	STTAX	ALL	
	TRADE	ALL	
Accreditation Manual for Hospitals	HEALTH	AMH	1989
Advanced Manufacturing Technology	NEXIS PATENT	ADMANF	1/82
Advanced Military Computing*	CMPCOM NEXIS	ADVMIL	1/90
Advanced Recovery Week	ENRGY NEXIS	ADVRW	1/90
Advantage*	NEXIS	ADV	1/85
Advertising Age®	FEDCOM MARKET	ADAGE	1/86
Advest, Inc.	NEXIS COMPNY INVEST	ADV	5/84
ADWEEK	MARKET NEXIS	ADWEEK	1/84
Aerospace America	MILTRY	AEROAM	1/84

	NEXIS		
Aerospace Daily®	NEXIS TRAN TRANS	AIRDLY	1/89
Alrica News	INTNEW NEXIS	AFRNWS	1/90
AIDS Background News***	BACKGR	AIDS	Current
Al Expert	CMPCOM NEXIS	AIEXPT	1/89
Airplane Crash Background News***	BACKGR	AIR	Current
Air Force Magazine	NEXIS	AIRFOR	1/90
Air Transport World*	NEXIS TRAN TRANS	AIRWLD	1/83
Airports®	NEXIS PATENT TRAN TRANS	AIRPTS	1/89
Alabama bill tracking	LEGIS	ALTRCK	1/90
Alabama Legislation (Slip laws)	LEGIS	ALALS	1989

Alaska bill tracking	LEGIS	AKTRCK	1/90
Alaska Legislation (Slip laws)	LEGIS	AKALS	1989
Alaska Business Monthly*	NEXIS	ABM	1/86
Alaska Journal of Commerce*	NEXIS	AJC	2/85
ALERT+			
– Archive	ALERT	ARCHIV	Last 3 weeks
– Update	ALERT	ALERT	Current
Alex Brown & Sons	COMPNY INVEST	AB	1/84
Algemene Bank Nederland N.V.	COMPNY INVEST	ABN	4/83
Algeria Country Reports***	REPORT	ALGER	1/87
Almanac of American Politics, The	EXEC LEGIS PEOPLE	AMPOL	1988
Altman Brenner & Wasserman Inc.	COMPNY INVEST	ABW	6/90
American Banker	BANKS INTNEW	AMBANK	1/79

	NEXIS		
American Family Physician	GENMED	AFP	1/82 to 3/87
American Federationist*	NEXIS	AFLCIO	3/84
American Forests*	NEXIS	AMFOR	1/90
American Hospital Formulary Service Drug Information 1987, The	GENMED	AHFS	1987
American Journal of Diseases of Children	GENMED	AJDC	1/82
American Journal of Psychiatry	GENMED	AJP	1/85 to 3/87
American Lawyer, The	GENFED LEGNEW NEXIS	AMLAWR	1/87
American Libraries*	NEXIS	AMERLB	1/83
American Papermaker (Pacific Edition)	NEXIS	AMPAPR	7/90
American Salesman*	MARKET NEXIS	AMSALE	1/90
Annals of Neurology	GENMED	ANN	1/84

			to 3/87
Annals of Plastic Surgery	GENMED	ANPS	1/84
Annual Reports-Corporate (ACPA)	NAARS	87	to 3/87
		86	7/83
		85	
		84	
		83	
Annual Reports-Government (ACPA)	NAARS	G86	7/86
			to 6/87
		G85	6/85
Annual Reports to Shareholders – SEC Filings	COMPNY	ARS	to 12/86 7/87
Antitrust & Trade Regulation Report	EXEC NEXIS	TRADRG	1/82
Archives of Dermatology	GENMED	ARD	1/82
Archives of General Psychiatry	GENMED	ARGP	1/82
Archives of Internal Medicine	GENMED	ARIM	1/82
Archives of Neurology	GENMED	ARN	1/82

Archives of Ophthalmology	GENMED	AROP	1/82
Archives of Otolaryngology	GENMED	AROT	1/82
Archives of Pathology & Laboratory Medicine	GENMED	ARP	1/82
Archives of Surgery	GENMED	ARS	1/82
Argentina Country Reports***	REPORT	ARGEN	1/87
Arizona Bill Tracking	LEGIS	AZTRCK	1/89
Arizona Legislation (Slip laws)	LEGIS	AZALS	1990

*Selected full text **Abstracts ***Selected Documents +Not available to all customers

M003167

ALPHABETICAL LIST 2

Title	Library Name	File Name	Coverage From
Arizona Business Gazette*	NEXIS	ARIZ	1/86
Arizona Republic, The*	NEXIS	ARZREP	1/90
Arizona Trend*	NEXIS	AZTR	1/86
Arkansas Bill Tracking	LEGIS	ARTRCK	1/91
Arkansas Legislation (Slip laws)	LEGIS	ARALS	1989
Arkansas Business*	NEXIS	ARK	4/87
Asahi News Service	INTNEW NEXIS	ASAHI	8/84
Asia Pacific Business*	INTNEW NEXIS	ASIA	6/86
Asian Wall Street Journal	INTNEW	AWS	4/89

Exhibit 49

Weekly** (abstracts)	NEXIS		
Associated Banks of Europe Corporation	INTNEW EUROPE	ABECOR	3/82
Associated Press, The			
– Campaign News	CMPGN	CAMPGN	11/80
– Candidate Biographies	APOLIT CAMPGN NEXIS PEOPLE	APBIO	1982
– News	NEXIS	AP	1/77
Atlanta Business Chronicle*	NEXIS	ABC	1/85
Atlantic, The*	NEXIS	ATLANT	1/83
Austin Business Journal*	NEXIS	AUST	1/85
Australia Country Reports***	REPORT	AUS	1/87
Austria Country Reports***	REPORT	AUSTR	1/87
Automation*	NEXIS	AUTOMA	1/83
Automotive Engineering*	NEXIS TRAN TRANS	AUTENG	1/89
Automotive Industries*	NEXIS PATENT	AUTOIN	1/83

	TRAN TRANS		
Automotive Marketing*	NEXIS TRAN TRANS	AUTOMK	1/83
Automotive News®	NEXIS TRAN TRANS	AUTONW	1/88
AutoWeek®	NEXIS TRAN	AUTOWK	1/88
Aviation Daily®	NEXIS TRAN TRANS	AVDLY	1/89
Aviation Week & Space Technology	NEXIS TRAN TRANS	AVWEEK	1/75
B			
BBC Summary of World Broadcasts	INTNEW NEXIS	BBCSWB	1/79
BC Business*	INTNEW	BCB	2/85

BDMI Limited	NEXIS COMPANY INVEST	BDM	8/90
BNA Banking Daily	BANKING BANKS	BNABD	Current
BNA Pension Reporter	BNA EXEC INSURE	PENSN	1/82
BNA Washington Insider	NEXIS EXEC LEGIS	BNAWI	9/87
BNA's Banking Report	NEXIS	BNABNK	1/82
BNH-The Business of New Hampshire*	NEXIS	HAMP	8/86
BPI Entertainment New Wire	NEXIS	BPIENT	10/90
BWD Rensburg Ltd.	COMPNY INVEST	BWD	1/90
BZW (Pacific Union Private Limited)	COMPNY INVEST	BZW	2/90
Back Stage*	NEXIS	BCKSTG	8/84
Bain Securities, Inc.	COMPNY	BSI	10/90

Baird Patrick & Co., Inc.	INVEST COMPNY	BDP	7/90
Bakery Production and Marketing*	INVEST NEXIS	BAKPRD	1/89
Baldwin's Kentucky Acts	LEGIS	KYACTS	Current
Balis Zorn Inc.	COMPNY INVEST	BZG	10/88
Baltimore Business Journal*	NEXIS	BALT	1/86
Banca Commerciale ???	COMPNY INVEST	BCI	6/83
Bank Management	BANKS NEXIS	BNKADM	1/81
Banking Expansion Reporter	BANKING BANKS EXEC NEXIS	BNKEXP	1/82
Banking Reform Hot File	LEGIS	BANKREF	1/91
Bankruptcy Legislative history	LEGIS	BKRLH	1978
Barclays de Zoete Wedd	COMPNY INVEST	BZW	2/90
Bateman Eichler Hill Richards Inc.	COMPNY	BEH	4/90

	INVEST		
Bear Stearns & Co.	COMPNY	BS	4/83
	INVEST		
Belgium Country Reports***	REPORT	BELG	1/87
Bell Lawne White & Co. Inc.	COMPNY	BLL	4/89
	INVEST		
Best's Review — Life Health	INSURE	BRLIFE	1/83
Insurance Edition*	NEXIS		
Best's Review — Property-Casualty	INSRLW	BRPROP	1/83
Insurance Edition*	INSURE		
	NEXIS		
Beverage World	NEXIS	BEVWLD	1/89
	PEOPLE		
Billings Business Journal*	NEXIS	BILL	6/86
Billings Gazette, The*	NEXIS	BIZ	2/88
Bioprocessing Technology	NEXIS	BIOPRO	1/82
	PATENT		
Biotechnology Newswatch	HEALTH	BIOTEC	5/81
McGraw-Hill's	NEXIS		
Boettcher & Company, Inc.	COMPNY	BOE	5/89
	INVEST		
Bond Buyer, The	BANKING	BNDBYR	1/81

BANKS
NEXIS

*Selected full text **Abstracts ***Selected documents +Not available to all customers

M003168

ALPHABETICAL LIST 3

Title	Library Name	File Name	Coverage From
Booz-Allen & Hamilton, Inc.	COMPNY INVEST	BAH	2/89
Boston Business*	NEXIS	BBM	3/87
Boston Business Journal*	NEXIS	BBJ	1/86
Boston Globe, The	INTNEW NEXIS	BGLOBE	9/88
Boulder County Business Report*	NEXIS	BBR	5/85
Brazil Country Reports***	REPORT	BRAZIL	1/87
British Journal of Surgery	GENMED	BJS	1/85 to 3/87
British Telecom World	CMPCOM INTNEW	BRTWLD	1/90

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Broadcasting*	NEXIS FEDCOM NEXIS	BRCAST	1/83
Bulgaria Country Reports***	REPORT	BULGAR	1/87
Business & Commercial Aviation*	NEXIS TRAN TRANS	BUSAV	1/83
Business America	EXEC NEXIS	BUSAMR	1/83
Business Asia	EUROPE REPORT	BUASIA	1/87
Business Atlanta*	NEXIS	BAL	5/85
Business China	EUROPE REPORT	BUCHIN	1/87
Business Digest of Southeastern Massachusetts*	NEXIS	BDMA	7/88
Business Digest of Southern Maine*	NEXIS	SMBD	4/87
Business Digest of the Cape & Islands*	NEXIS	BDCC	5/88
Business Eastern Europe	EUROPE REPORT	BUEEUR	1/87

Business Europe	EUROPE REPORT	BUSEUR	1/87
Business First-Buffalo*	NEXIS	BUFF	2/85
Business First-Columbus*	NEXIS	BFC	4/85
Business First-Louisville*	NEXIS	BFL	1/85
Business for Central New Jersey*	NEXIS	JERS	10/88
Business Guide to EC Initiatives	EUROPE	ECINIT	1/87
Business Insurance®	ESTATE INSRLW INSURE NEXIS	BUSINS	1/88
Business International	EUROPE REPORT	BUSINT	1/87
Business International Forecasting Services	EUROPE REPORT	BIFSVC	1/87
Business International Money Report	EUROPE REPORT	BUSIMR	1/87
Business Journal of New Jersey*	NEXIS	BJNJ	1/85
Business Journal-Charlotte, The*	NEXIS	CHAR	7/87
Business Journal-Hartford, The*	NEXIS	HART	11/87
Business Journal-Jacksonville, The*	NEXIS	JACK	11/87

Business Journal-Milwaukee, The*	NEXIS	MIL	10/85
Business Journal-Phoenix & the Valley of the Sun, The*	NEXIS	PBJ	1/86
Business Journal-Portland, The*	NEXIS	PORT	1/84
Business Journal-Sacramento, The*	NEXIS	SAC	12/85
Business Journal-San Jose, The*	NEXIS	JOSE	10/85
Business Latin America	EUROPE REPORT	BUSLAM	1/87
Business Law Brief	INTNEW NEXIS	BLB	
Business Lawyer, The	ABA BANKING CORP GENFED FEDSEC LAWREV NEXIS TRADE LEGNEW	BUSLAW	11/81
Business News*	NEXIS	BNI	10/86
Business News From Poland	INTNEW	BNP	2/90

	EUROPE NEXIS		
Business-North Carolina	NEXIS	BNC	2/85
Business Record*	NEXIS	BREC	5/85
Business Times-Hartford, The*	NEXIS	TBT	2/85
Business Update	EUROPE REPORT	BUSUPD	1/87
Business View*	NEXIS	BVM	8/85
Business Week	NEXIS	BUSWK	1/75
Business Wire	COMPNY MARKET NEXIS	BWIRE	9/83
Business Worcester*	NEXIS	BWOR	2/86
BYTE	CMPCOM NEXIS	BYTE	1/82
C			
C.J. Lawrence, Morgan Grenfell Inc.	COMPNY INVEST	CJL	1/83
CCF Elysees Bourse	COMPNY	CCF	1/90

CCF Laurence Prust Limited	INVEST COMPNY	CLP	2/90
CD ROM Librarian	INVEST CMPCOM	CDROML	7/88
CTK National News Wire	NEXIS EUROPE	CTK	10/90
California Bill Tracking	INTNEW NEXIS LEGIS	CATRCK	1/90
California Legislation (Slip laws)	LEGIS	CAALS	1987
California Full Text Legislation (Pending bills)	LEGIS	CATEXT	12/90
California Corporation Information	COMPNY	CASOS	1983
California Executive, The*	NEXIS	CAEX	10/87
California Public Contractors State Licensing Board	COMPNY	CACON	Current
California Secretary of State Uniform Commercial Code	COMPNY	CAUCC	1965
California State Board of Equalization Sales Tax Registration Information	COMPNY	CASALE	1956
Campaigns & Elections	CMPGN	C&E	10/89

Canada Country Reports***	NEXIS REPORT	CANADA	1/87

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 4

Title	Library Name	File Name	Coverage From
Canadian Business*	INTNEW NEXIS	CANBUS	1/83
Cancer	GENMED	CA	1/85
Cancer Treatment Reports	GENMED	CTR	1/83
Cancer Treatment Symposia	GENMED	CTS	1983 to 3/87
Capital District Business Review	NEXIS	CDBR	2/87
Capital Source™, The	CMPGN EXEC	CAPTAL	Current
Car & Driver*	NEXIS	CARDRY	1/88

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	TRAN TRANS		
Central and Eastern Europe Legal Texts	EUROPE	EELEG	11/90
Central New York Business Journal*	NEXIS	CNYJ	3/85
Central News Agency	INTNEW NEXIS	CENEWS	4/84
Central Pennsylvania Business Digest*	NEXIS	BDCP	1/85
Chain Store Age Executive*	NEXIS	CSAEXC	1/83
Charterhouse Tilney	COMPNY INVEST	CHT	11/89
Chemical Engineering	NEXIS	CHEMEN	1/81
Chemical Marketing Reporter*	NEXIS	CHMMKT	1/89
Chemical Week	NEXIS	CHEMWK	1/75
Chicago Corporation, The	COMPNY INVEST	CHC	10/90
Chicago Tribune	NEXIS	CHTRIB	1/88
Chile Country Reports***	REPORT	CHILE	1/87
China Country Reports***	REPORT	CHINA	1/87
China Hand	EUROPE REPORT	CHINAH	1/87
Christian Science Monitor, The	INTNEW	CSM	1/80

	NEXIS		
Cincinnati Business Courier*	NEXIS	CBC	1/85
Citicorp Vickers Hong Kong	COMPNY INVEST	CTV	10/90
Civil Aeronautics Board Decisions	TRAN	CAB	3/79 to 12/84
Clean-Coal/Synfuels Letter	ENERGY ENRGY ENVIRN NEXIS	SYNFLS	5/82
Clinical Orthopaedics & Related Research	GENMED	CLOR	1/83
Clinical Pediatrics	GENMED	CLP	1/83
Coal	ENRGY NEXIS	COAL	1/81
Coal Week	ENRGY NEXIS	COALWK	1/81
Coal Week International	ENRGY NEXIS	COALIN	1/81
Coburn & Meredith, Inc.	INTNEW COMPNY	CMI	4/90

Code of Federal Regulations (U.S.) (all titles)	INVEST CODES EXEC GENFED BANKS	CFR	Current
Code of Federal Regulations (U.S.) (Titles 12 and 31)		REGS	Current
Columbia Country Reports***	REPORT	COLOM	1/87
Colorado Bill Tracking	LEGIS	COTRCK	1/90
Colorado Legislation (Slip laws)	LEGIS	COALS	1989
Colorado Full Text Legislation (pending bills)	LEGIS	COTEXT	1/91
Colorado Business*	NEXIS	COLO	6/86
Colorado Corporation/Limited Partnership Information	COMPNY	COSOS	Current
Colorado Trademark/ Service Information	COMPNY	COTM	Current
COMLINE Daily News – Biotechnology and Medical Technology	INTNEW NEXIS	JAPBIO	1/89
– Chemicals and Materials	INTNEW	JAPCHM	1/89

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– Computers	NEXIS CMPCOM INTNEW	JAPCOM	1/89
– Electronics	NEXIS CMPCOM INTNEW	JAPELE	1/89
– Industrial Automation and Mechanical Engineering	NEXIS INTNEW	JAPA	1/89
– Telecommunications	NEXIS CMPCOM INTNEW	JAPTEL	1/89
– Tokyo Financial Wire	NEXIS BANKS INTNEW	TOKFIN	1/89
– Transportation	NEXIS INTNEW	JAPTRN	1/89
	NEXIS		
Commission of the European			
– Legislation	EUROPE	LEGIS	7/79
– Implementing Directives	EUROPE	NATPRV	7/79
– Parliamentary Questions	EUROPE	PARLQ	7/79

Exhibit 49

– Preparatory Acts	EUROPE	PREP	1975
– Treaties	EUROPE	TREATY	7/79
Committee Reports	LEGIS GENFED	CMTRPT	1/90
Communication World*	NEXIS	COMWLD	1/89
Communications Daily	CMPCOM NEXIS	COMDLY	1/84
Communications International*	CMPCOM INTNEW NEXIS	CMNTL	1/90
Communications of the ACM*	CMPCOM NEXIS	CACM	1/88
Compensation and Benefits Review*	INSURE NEXIS	COMBEN	1/89
Computer Aided Engineering*	CMPCOM NEXIS	CMPAID	1/89
Computer Decisions*	CMPCOM NEXIS	CMPDEC	1/83
Computer & Software News*	CMPCOM NEXIS	CMPSFT	1/88
Computer Design*	CMPCOM NEXIS PATENT	CMPDGN	1/88

Computer Graphics World*	CMPCOM NEXIS	CPGWLD	1/90

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 5

Title	Library Name	File Name	Coverage From
Computer Language*	CMPCOM NEXIS	CMPLAN	1/89
Computer Lawyer, The	CMPCOM NEXIS	CPLWR	1/90
Computergram International*	CMPCOM NEXIS	CMPINT	1/89
Computers in Banking	BANKS CMPCOM NEXIS	CMPBNK	1/88
Computerworld	CMPCOM NEXIS	CMPWLD	1/82

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Congressional			
- Billcast™ Archive	LEGIS	BLARCH	99th
- Billcast™ Legislative Forecasts	LEGIS	BLCAST	Current
- Bill Tracking – 101st Congress Archive	LEGIS	BLT101	101st
- Bill Tracking Report	LEGIS	BLTRCK	Current
- Committee Membership Profile Report	CMPGN LEGIS	COMTEE	Current
- Committee Schedule Report	CMPGN LEGIS	COMSCH	101st
- Committee Vote Report	CMPGN LEGIS	COMVTE	101st
- Congressional Committee Votes Archive	CMPGN LEGIS	CVTARC	101st
- Daily Digest 102nd	LEGIS	102DIG	102nd
- District/State Profile Report	LEGIS	DIS/ST	Current
- Extension of Remarks, 102nd Congress	CMPGN LEGIS	102RMK	102nd
- Floor Votes	CMPGN LEGIS	VOTES	102nd

Exhibit 49

- Floor Votes Archive	CMPGN LEGIS	VOTARC	100th
- Full Text of Bills	LEGIS	BLTEXT	Current
- Full Text of Bills Archive	LEGIS	BTX101	101st
- Honorana Contributions by Organization	CMPGN LEGIS	HONORA	1986
- Honorana Receipts by Member	CMPGN LEGIS	MEMHON	1986
- House of Representatives, 102nd Congress	LEGIS	102HSE	102nd
- Legislative Record by Member	CMPGN LEGIS	MLEGIS	100th
- Media Report (ADI)	CMPGN LEGIS MARKET	MEDIA	Current
- Member Financial Report	CMPGN LEGIS	MEMFIN	1988
- Member Profile Report	LEGIS PEOPLE	MEMBR	Current
- Political Action Committee Report	CMPGN LEGIS	PAC	1988

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- Senate 102nd Congress	LEGIS	102SEN	102nd
Connecticut Bill Tracking	LEGIS	CTTRCK	2/90
Connecticut Legislation	LEGIS	CTALS	1987
Connecticut Secretary of State Corporation Records	COMPNY	CTINC	Current
Construction Review*	NEXIS	CONREV	5/84
Consumer Electronics*	NEXIS	CONELC	1/83
Consumer Reports®	MARKET	CONSMR	1/88
Cook Political Report, The	NEXIS CMPGN	CKRPT	3/88
Coopers & Lybrand Europe	NEXIS COMPNY INVEST	CLE	4/90
Corporate and UCC Filings/ Searching Assistance Information	COMPNY	FILTIP	Current
Corporate Cashflow Magazine*	BANKS NEXIS	CRCASH	2/90
Corporate EFT Report*	BANKS NEXIS	CREFT	1/90
Corporate Report — Kansas City, The*	NEXIS	CRKC	11/86

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Corporate Report Minnesota, The*	NEXIS	CRMN	10/87
Cosmetic & Toiletries*	NEXIS	CSMTLT	1/90
Cosmetics International*	INTNEW	CSMINT	1/90
Country Monitoring Service	NEXIS EUROPE REPORT	CMONSV	1/87
Country News Alerts***	ALERT	ALERT	Current
Country Profile	EUROPE REPORT	COUPRF	1/87
Country Report	EUROPE REPORT	COURPT	1/87
Country Reports	EUROPE REPORT	RPTIBC	1/87
County NatWest Securities Asia Ltd.	COMPNY INVEST	CNA	7/90
Courier-Journal, The*	NEXIS	COUR	2/88
Craig-Halum Inc.	COMPNY INVEST	CH	4/88
Crain's Chicago Business®	NEXIS	CHIBUS	1/86
Crain's Cleveland Business*	NEXIS	CCLE	1/86

Crain's Detroit Business*	NEXIS	CDET	1/86
Crain's New York Business	NEXIS	NYBUS	1/87
Credit Suisse First Boston Limited	COMPNY INVEST	CSF	7/90
Credit Union Executive*	BANKS NEXIS	CUEXEC	1/90
Current Digest of the Soviet Press, The	INTNEW NEXIS	CDSP	6/83
Czechoslovakia Country Reports***	REPORT	CZECHO	1/87
D			
DAFSA	COMPNY INVEST	DAF	2/82
DEC User*	CMPCOM NEXIS	DECUSR	1/90
DEGAB	COMPANY INVEST	DGB	3/82
DG Review*	CMPCOM NEXIS	DGREV	1/88
DM News	MARKET NEXIS	DMNEWS	2/85

Daily Labor Report	EXEC NEXIS	DLABRT	1/82

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 6

Title	Library Name	File Name	Coverage From
Daily Report for Executives	EXEC LEGIS NEXIS LEGNEW	DREXEC	1/82
Daily/Sunday Telegraph, The	EUROPE INTNEW NEXIS	TELEGR	9/88
Dain Bosworth Incorporated	COMPNY INVEST	DB	1/83
Dairy Foods Magazine*	NEXIS	DYFOOD	1/89
Daiwa Securities Co., Ltd.	COMPANY	DAI	10/90

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	INVEST		
Dallas Business Journal*	NEXIS	DFW	1/85
Dallas Magazine	NEXIS	DALL	1/86
Dallas Times Herald*	NEXIS	DALTIME	3/90
Data Based Advisor*	CMPCOM NEXIS	DBADVS	1/89
Data Channels	CMPCOM NEXIS	DATACH	1/90
Data Communications*	CMPCOM NEXIS	DATA	1/82
Database*	CMPCOM NEXIS	DBASE	7/88
Database Searcher*	CMPCOM NEXIS	DBASES	7/88
Datamation*	CMPCOM NEXIS	DATAMA	1/83
Dayton-Springfield Business Life*	NEXIS	DSBL	2/87
Dean Witter Reynolds Inc.	COMPNY INVEST	DW	3/88
Decision Resources Incorporated	COMPNY INVEST	ADL	2/87- 3/90

Defense & Foreign Affairs' Strategic Policy	NEXIS	DFA	1/81
Defense & Foreign Affairs Weekly	INTNEW NEXIS	DFAWKY	1/81
Defense Electronics	NEXIS	DEFLC	1/82
Defense News	NEXIS	DEFNEW	1/90
Delaware bill tracking	LEGIS	DETRCK	1/89
Delaware Legislation (Skip News)	LEGIS	DEALS	1989
Delaware Secretary of State Corporation and Limited Partnership Information	COMPNY	DESOS	
Delaware Valley Business Digest*	NEXIS	BDDV	1/85
Denmark Country Reports***	REPORT	DEN	1/87
Denver Business*	NEXIS	DBW	1/85
Denver Business Journal, The*	NEXIS	DENV	10/86
Denver Post, The*	NEXIS	DPST	8/88
Department of State Dispatch	EXEC	DSPTCH	1/90
Department of Transportation Aviation Decisions	INTNEW TRAN	OTAV	1/85
Detroit News, The*	NEXIS	DETNWS	1/90

Digital Review*	CMPCOM NEXIS	DGTREV	1/88
Dillon Read & Company, Inc.	COMPNY INVEST	DR	11/88
Dimensions in Health Care	HEALTH	DHC	8/83
Direct Marketing Magazine*	MARKET NEXIS	DIRMKT	1/90
Directory of Bankruptcy Attorneys	PEOPLE	BKRDIR	Current
Disclosure® Online Database	COMPNY	DISCLO	Current
Discount Store News*	NEXIS	DSNEWS	2/83
Diseases of the Colon and Rectum	GENMED	DCR	1/84
Distribution*	NEXIS	DSTBUT	1/83
District of Columbia Legislation	LEGIS	DCALS	1990
Doing Business in Eastern Europe	EUROPE REPORT	DBUSEU	1/87
Donaldson, Lufkin & Jennette Securities Corp.	COMPANY INVEST	DLJ	3/83
Dr. Dobb's Journal of Software Tools*	CMPCOM NEXIS	DOBBS	1/88
Drug and Cosmetic Industry*	NEXIS	DRGCOS	1/89
Drug Store News*	NEXIS	DRUGST	1/90

Drug Topics*	NEXIS	DRUGTP	1/83
Duff & Phelps	COMPNY	DNP	1/91
	INVEST		
E			
EC Energy Monthly	ENRGY	ECENGM	1/89
	INTNEW		
	NEXIS		
EDN*	CMPCOM	EDN	1/88
EFT Reports*	BANKS	EFTROT	1/90
	NEXIS		
ENR	NEXIS	ENR	1/81
ESD: Electronic System Design Magazine*	CMPCOM	ESD	1/88
	NEXIS		
East Asian Executive Reports	INTNEW	EASIAN	1/81
	NEXIS		
East European Markets	BANKING	EEM	1/89
	INTNEW		
	MARKET		
	NEXIS		

East Germany Country Reports***	REPORT	EGER	1/87
Earthquake Background News***	BACKGR	EARTH	1/87
Economic Risk Service	EUROPE REPORT	ECOSVC	1/87
Economist, The	BANKING BANKS EUROPE INTNEW NEXIS	ECON	1/75
Ecuador Country Reports***	REPORT	ECUAD	1/87
Education Update	GOVNEWS NEXIS	EDUP	Summer
Egypt Country Reports	REPORT	EGYPT	1/87
Electric Light & Power	ENRGY NEXIS	ELP	1/90
Electric Utility Week	ENERGY ENRGY NEXIS PATENT UTILITY	ELUTL	1/81
Electrical Review*	NEXIS	ELRVW	1/90

Electronic Business	CMPCOM NEXIS	ELCBUS	1/88
Electronic Design*	CMOCOM NEXIS	ELCDES	1/83

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ALPHABETICAL LIST 7

Title	Library Name	File Name	Coverage From
Electronic Learning*	CMPCOM NEXIS	ELCRN	1/88
Electronic Media™	NEXIS	EMEDIA	1/88
Electronic News*	CMPCOM NEXIS	ELCNEWS	1/83
Electronics	CMPCOM NEXIS	ELECTR	1/81
Energy Journal, The*	ENRGY NEXIS	ENRJNL	1/89

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Energy Listener Series	ENRGY NEXIS	ENRLST	7/90
Energy Report, The*	ENRGY NEXIS	ENGRPT	1/90
Energy User News	ENRGY EXEC NEXIS	ENRNWS	1/83
Engineering and Mining Journal	ENVIRN NEXIS	EMJ	1/81
Environmental Legislative History	LEGIS	ENVLH	1978
Epplec Guerin & Turner, Inc.	COMPNY INVEST	EGT	1/90
Estate Tax Legislative History	LEGIS	ESTLH	1978
Europe News***	EUROPE	NEWS	1989
European Communities Case Law+	EUROPE	CASES	1/54
European Cosmetic Markets*	INTNEW MARKET NEXIS	EURCSM	1/90
European Energy Report	ENRGY	EER	1/89

	INTNEW NEXIS		
European Intelligence+	EUROPE	EURINT	1/89
European Report+	EUROPE	EURRPT	1/89
Euroscope Database	EUROPE	EURSCP	1/89
Evans Economics Electronic New Service	BANKS COMPNY NEXIS	EARN	Current
Executive Changes News***	PEOPLE	EXECHG	1976
Executive Report*	NEXIS	EXEC	1/85
Executive Speaker®, The	MARKET NEXIS	EXECSP	6/80
Expert and the Law, The	LEGNEW NEXIS	EXPTLW	12/81
Extel Cards Database	COMPNY EUROPE	EXTEL	10/89
F			
FDA Consumer	EXEC MARKET NEXIS	FDA	1/84

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F- D-C Reports:			
- Blue Sheet, The	GENMED	BLUE	1/84
- Gray Sheet, The	GENMED	GRAY	1/84
- Green Sheet, The	GENMED	GREEN	1/85
- Pink Sheet, The	GENMED	PINK	1/84
- Rose Sheet, The	GENMED	ROSE	1/84
FT Energy Economist	ENRGY INTNEW NEXIS	ENRECO	1/88
Facts on File World News Digest	INTNEW NEXIS	FACTS	1/75
Fairfield County Business Journal*	NEXIS	SCBJ	11/87
Federal Contract Report	EXEC NEXIS	FDCONT	1/82
Federal Energy Regulatory Commission Decisions	ENRGY	FERC	1/77
Federal News Service	CMPGN EXEC FEDCOM LEGIS NEXIS	FEDNEW	8/88

Federal Power Commission Decisions	ENRGY	FPC	9/77
Federal Register (United States)	BANKNG BKRTCY BANKS CODES ENVIRN FEDCOM FEDSEC GENFED EXEC IMMIG LABOR MILTRY PATENT PUBCON PUBHW TRADE UCC UTILTY	FEDREG	7/80
Federal Reserve Bulletin	BANKNG	FEDRB	1/70

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	EXEC		
Federal Tax Legislative History	LEGIS	TAXLH	1954
FEDWATCH®	BANKNG	FEDWTC	3/84
	BANKS		
	NEXIS		
Fiber Optic News*	CMPCOM	FIBROP	1/90
	NEXIS		
Finance and Development*	BANKS	FINDEV	1/90
	NEXIS		
Financial Executive*	BANKS	FINEXC	1/90
	NEXIS		
Financial Industry Information	BANKNG	FINIS	1/82
Service**	BANKS		
	COMPNY		
	NEXIS		
Financial Institutions Reform,	LEGIS	FIRREA	1989
Recovery, Enforcement Act of 1989			
(With legislative histories)			
Financial Market Trends*	BANKS	FINMKT	1/90
	NEXIS		
Financial Regulation Report	BANKNG	FRR	1/89

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	BANKS INTNEW NEXIS		
Financial Review, The*	BANKS NEXIS	FINRVW	1/90
Financial Services Reports*	BANKS NEXIS	FINSVC	1/90

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 8

Title	Library Name	File Name	Coverage From
Financial Services Week	NEXIS	FSW	7/90
Financial Times+	BANKING BANKS EUROPE INTNEW NEXIS	FINTIME	1/82
Financial World	BANKING	FINWLD	1/83

	BANKS ENRGY NEXIS		
Financing Foreign Operations	REPORT	FINFOR	1/87
Finland Country Reports***	REPORT	FIN	1/87
FinTech 1 Telecom Markets	CMPCOM INTNEW NEXIS	FTTEL	1/88
FinTech 2 Electronic Office	CMPCOM INTNEW NEXIS	FTELC	1/88
FinTech 7 Mobile Communications	CMPCOM INTNEW NEXIS	FTMCOM	1/89
First Boston Corporation, The	COMPNY INVEST	FB	7/86
Fitch Investors Service, Inc.	COMPNY INVEST	FIT	9/84
Flight International	NEXIS TRAN	FLIGHT	1/89
Flood Background News***	BACKGR	FLOODS	Current

Florida bill tracking	LEGIS	FLTRCK	2/90
Florida Legislation (Slip laws)	LEGIS	FLALS	1987
Florida Business — Tampa Bay	NEXIS	TAMP	8/87
Florida Trend*	NEXIS	FLOR	7/86
Focus*	NEXIS	FOC	1/85
Folio: The Magazine for Magazine Management*	MARKET NEXIS	FOLIO	11/84
Food & Beverage Marketing	MARKET NEXIS	FOODBEV	1/90
Food & Nutrition	NEXIS	FOOD	4/84
Food Engineering	NEXIS	FOODEN	1/90
Food in Canada*	INTNEW NEXIS	FDCAN	1/90
Food Manufacture International**	NEXIS	FDMAN	1/90
Food Trade Review*	NEXIS	FDTRD	1/90
Footwear News*	NEXIS	FTNEWS	1/83
Forbes	NEXIS	FORBES	1/75
Forbes Annual Dictionary	COMPNY	FORBAD	1984
Foreign Affairs	INTNEW NEXIS	FORAFR	1981
Forest Fire Background News***	BACKGR	FIRE	Current

Forest Industries*	ENVRN NEXIS	FORIND	1/89
Fort Worth Magazine*	NEXIS	FTW	1/86
Fortune	EUROPE NEXIS	FORTUN	1/77
Foster Natural Gas Report	ENRGY NEXIS	FINGAS	1/81
Foundry Management & Technology*	NEXIS	FOUNDR	2/83
Fox-Pitt, Kelton, Inc.	COMPNY INVEST	FOX	7/84
France Country Reports***	REPORT	FRANCE	1/87
Frozen and Chilled Foods*	NEXIS	FRFOOD	1/90
Futures: The Magazine of Commodities & Options*	BANKS NEXIS	FUTMAG	1/90
Futurist, The	MARKET NEXIS	FUTURE	1/89

G

Gannett News Service	NEXIS	GNS	1/89
Gas Market Report	ENRGY	GASMKT	1/81
	NEWS		
Gas World*	ENRGY	GASWLD	1/90
	NEXIS		
Gazeta International	EUROPE	GAZETA	3/90
	INTNEW		
	NEXIS		
Genetic Technology News	HEALTH	GENTEC	1/82
	NEXIS		
Georgia Bill Tracking	LEGIS	GATRCK	1/90
Georgia Legislation (Slip laws)	LEGIS	GAALS	1989
Georgia Secretary of State	COMPNY	GASOS	
Georgia Trend*	NEXIS	GEOR	7/86
Gerard Klauer Mattison & Co.	COMPNY	GKM	9/90
	INVEST		
Gordon Telecommunications	CMPCOM	GORDON	1/90
	NEXIS		
Gorman's New Product News	MARKET	NPRODN	1/89
	NEXIS		
Government Computer News*	CMPCOM	GOVCMP	1/88

	NEXIS		
Government Employee Relations Report	EXEC NEXIS	GOVEMP	1/82
Government Executive	EXEC NEXIS	GOVEXEC	1/90
Grand Rapids Business Journal*	NEXIS	BJGR	6/85
Graphic Arts Monthly*	NEXIS	GRAPH	1/83
Greece Country Reports***	REPORT	GREECE	1/87
Greater Baton Rouge Business Report, The*	NEXIS	BRB	7/86
Greensboro News & Record*	NEXIS	NCNR	4/88
Grocery Marketing*	MARKET NEXIS	GRCMKT	1/90
H			
H.C. Wainwright & Co.	COMPNY INVEST	HCW	8/90
HFD — The Weekly Home Furnishings Newspaper	NEXIS	HFDNWS	1/83
Hambrecht & Quist Inc.	COMPNY INVEST	HMQ	6/90

Handbook on Injectable Drugs	GENMED	HID	Current
Harvard Business Review	NEXIS	HBR	1/76
Hawaii Bill Tracking	LEGIS	HITRCK	1/90
Hawaii Legislation (Slip laws)	LEGIS	HIALS	1989
Hawaii Business*	NEXIS	HIB	1/85
Health*	NEXIS	HEALTH	1/83
Healthcare Financial Management*	EMPLOY	HLTFIN	1/89
	INSURE		
	NEXIS		
	PUBEMP		
	PUBHW		

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 9

Title	Library Name	File Name	Coverage From
Henderson Crosthwaite Institutional Brokers, Ltd.	COMPNY	HCR	3/90
	INVEST		

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Henry Cooke, Lumsden PLC	COMPNY INVEST	HCL	11/89
Heritage Foundation Reports	EXEC LEGIS NEXIS	HFRPTS	5/77
Hewlett-Packard Journal*	CMPCOM NEXIS	HPJNL	1/88
Hibbard Brown & Company, Inc.	COMPNY INVEST	HBC	10/88
High-Tech MATERIALS Alert	CMPCOM NEXIS	HTMTRL	1/84
Hoare Govett Investment Research	COMPNY INVEST	HGV	1/90
Hornans, McGraw, Trull, Valeo & Company	COMPNY INVEST	HMG	7/88
Hong Kong Country Reports***	REPORT	HKONG	Current
Hospitals*	NEXIS	HOSPTL	1/83
Hotline, The	CMPGN LEGIS NEXIS	HOTLNE	1/90
Houston Business Journal*	NEXIS	HBJ	2/85

Hungary Country Reports***	REPORT	HUNGAR	1/87
Hungary Handbook, The	EUROPE	HUNHAN	1990
Supplements	REPORT		11/90
Hurricane Background News***	BACKGR	HURRIC	Current
I			
IBC Brazil Service	REPORT	IBCBRA	1/89
IBC International Country Risk Guide	REPORT	IBCCRG	1/90
IBC International Reports	REPORT	IBCINT	1/89
IBC International Market Alert	REPORT	IBCMAR	1/91
IBC Mexico Service	REPORT	IBCMEX	1/89
IBM System User*	CMPCOM NEXIS	IBMSYS	1/90
ICC Full-Text Keynote Market Reports	COMPNY	ICCMKT	1/90
ICC Full-Text Quoted Company	COMPNY	ICCCO	1987
Annual Reports			
IDP Report*	CMPCOM NEXIS	IDPRPT	7/88
Idaho bill tracking	LEGIS	IDTRCK	1/90
Idaho Legislation (Slip laws)	LEGIS	IDALS	1989
Illinois Bill Tracking	LEGIS	ILTRCK	1/89

Illinois Legislation (Slip laws)	LEGIS	ILALS	1989
Illinois Corporate Information	COMPNY	ILINC	1900
Illinois Legal Times	NEXIS LEGNEW	ILT	1/90
Illinois Secretary of States Uniform Commercial Code Information	COMPNY	ILUCC	Current
Inc.	NEXIS	INC	6/81
Independent, The	ENRGY EUROPE INTNEW NEXIS	INDPNT	1/90
Independent Power Report	ENRGY NEXIS	IPR	1/89
India Country Reports***	REPORT	INDIA	1/87
Indiana Bill Tracking	LEGIS	INTRCK	1/90
Indiana Legislation (Slip laws)	LEGIS	INALS	1989
Indiana Business*	NEXIS	INDB	1/85
Indiana Secretary of State Corporate & Limited Partnership Information	COMPNY	INSOS	Current
Indianapolis Business Journal*	NEXIS	IBJ	1/85

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Indonesia Country Reports***	REPORT	INDO	1/87
Industrial Communications*	CMPCOM NEXIS	INDCOM	6/90
Industrial Computing*	CMPCOM NEXIS	INDCMP	1/90
Industrial Distribution*	NEXIS	INDDIS	1/89
Industrial Energy Bulletin	ENRGY NEXIS	IEB	1/89
Industry Week	NEXIS	INDWK	1/81
Information Bank™ Abstracts, The*	COMPNY NEXIS	ABS	1/69
Information Bank™ – Advertising and Marketing Intelligence Service	COMPNY MARKET NEXIS	AMI	1/79
Information Today*	CMPCOM NEXIS	INFTDY	7/88
InfoWorld	CMPCOM NEXIS	INFWLD	7/83
Inside Energy with Federal Lands	ENRGY	INERGY	1/81

Inside F.E.R.C.	NEXIS ENRGY NEXIS	INFERC	1/81
Inside F.E.R.C.'s Gas Market Report	ENRGY NEXIS	GASMKT	1/89
Inside N.R.C.	ENRGY NEXIS	INNRC	1/81
Inside R&D	CMPCOM NEXIS	INRD	1/82
INSIGHTS	NEXIS	INSITE	1/90
Institutional Distribution*	NEXIS	INDIST	1/90
Institutional Investor	BANKNG BANKS NEXIS	INVEST	1/88
Institutional Investor Newsletters	BANKNG BANKS NEXIS	IINEWS	1/88
Insurance Information Institute Abstracts**	INSURE NEXIS	IIABS	4/84

Insurance Information Institute's Data Base Reports	COMPNY INSURE NEXIS	IIRPTS	Current
Insurance Periodicals Index™ (NILS Publishing)	INSURE NEXIS	IPI	1984
Insurance Review*	INSURE NEXIS	INSRVW	1/89
Integrated Waste Management	ENERGY NEXIS	IWM	1/89
Inter Press Service, The	INTNEW NEXIS	INPRES	4/84
Intercorp*	NEXIS	CBR	1/86
International Coal Report	ENRGY	ICR	1/88

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	INTNEW NEXIS		

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 10

Title	Library Name	File Name	Coverage From
International Gas Report	ENRGY INTNEW NEXIS	IGASR	1/88
International Petrochemical Report	ENRGY INTNEW NEXIS	PETCHM	1/83
International Trade Finance	BANKNG INSURE INTNEW	ITF	1/89

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International Trade Reporter	NEXIS INTNEW	INTNEW	7/84
Interstate/Johnson Lane	NEXIS COMPNY	INT	5/83
Investext® Brokerage House Reports	INVEST COMPNY	COIND	1982
– International	COMPNY	INTL	1982
– U.S.	COMPNY	US	1982
– Company	COMPNY	CO	1982
– Industry	COMPNY	IND	1982
Investing Licensing & Trading	EUROPE REPORT	INLITR	1/87
Investment Dealers' Digest	NEXIS	IDD	1/90
Investor's Daily	BANKS NEXIS	INVDLY	1/90
Iowa bill tracking	LEGIS	IATRCK	1/90
Iowa Legislation (Slip laws)	LEGIS	IAALS	1989
Iraq Country Reports***	REPORT	IRAQ	1/87
Ireland Country Reports***	REPORT	IRE	1/87
Israel Country Reports***	REPORT	ISRAEL	1/87
Issues in Bank Regulation	BANKNG	BNKREG	Winter

	BANKS EXEC NEXIS		1981
Italy Country Reports***	REPORT	ITALY	1/87
J			
J.C. Bradford & Co.	COMPNY INVEST	JCB	11/83
JCAH Perspectives	HEALTH	PERS	1/84
Jack O'Dwyer's Newsletter	MARKET NEXIS	ODWYER	1/89
Jackson Journal of Business*	NEXIS NEXIS	JJB	5/85
James Capel & Co. Ltd.	COMPNY INVEST	JCC	2/90
Janney Montgomery Scott Inc.	COMPNY INVEST	JMS	8/88
Japan Country Reports***	REPORT	JAPAN	1/87
Japan Economic Journal, The	INTNEW NEXIS	JEJ	6/80

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Japan Economic Newswire	INTNEW NEXIS	JEN	3/80
Jesup, Josephthal & Co., Inc.	COMPNY INVEST	JSJ	9/90
Jiji Press Ticker Service	INTNEW NEXIS	JIJI	1/80
Johnson Rice & Company	COMPNY INVEST	JR	1/89
Johnston, Lemon & Company	COMPNY INVEST	JL	5/89
Journal of Accountancy	NAARS	JNLACC	1/87
Journal of Advertising*	MARKET NEXIS	JNLADV	1/89
Journal of Consumer Research*	MARKET NEXIS	JCONRS	1/89
Journal of Marketing*	MARKET NEXIS	JNLMKT	1/90
Journal of Marketing Research*	MARKET NEXIS	JNLMRS	1/90

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Journal of Risk & Insurance*	INSURE NEXIS	JRISK	6/89
Journal of Small Business Management*	NEXIS	JSMBUS	7/84
Journal of Systems Management*	CMPCOM NEXIS	JSYMGT	1/89
Journal of the American Medical Association	GENMED	JAMA	1/82
Journal of the National Cancer Institute	GENMED	JNCI	1/83
K			
Kaleidoscope: Current World Data	EUROPE INTNEW REPORT	KCWD	Current
Kansas Bill Tracking	LEGIS	KSTRCK	1/89
Kansas Legislation (Slip laws)	LEGIS	AKALS	1988
Kansas Business News*	NEXIS	KBN	1/85
Kansas City Business Journal*	NEXIS	KCBJ	10/87
Keefe BankWatch	COMPNY	KBW	1/89

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Kenneth Jerome & Company, Inc.	INVEST COMPNY	KJR	6/90
Kentucky Bill Tracking	INVEST LEGIS	KYTRCK	11/88
Kentucky Legislation (Slip laws)	LEGIS	KYALS	1986
Kidder, Peabody & Company Inc.	COMPNY	KP	1/83
Kredietbank NV	INVEST COMPNY	KB	9/83
Kuwait Country Reports***	INVEST REPORT	KUWAIT	Current
L			
Ladenburg, Thalman & Co. Inc.	COMPNY	LDB	3/90
Laing & Cruickshank	INVEST COMPNY	LNC	5/90
LAN Times	INVEST CMPCOM	LANTME	1/90
Las Vegas Business Press*	NEXIS NEXIS	VEGA	5/86

Laserdisk Professional*	CMPCOM NEXIS	LASDSK	1/89
Lasers & Optronics*	NEXIS	LSROPT	1/90
Latin American Newsletters	NEXIS	LAN	4/67
Law Practice Management	ABA GENFED LEGNEW	LGECON	1/82
Legal Times	GENFED LEGNEW NEXIS	LGLTME	1/82

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 11

Title	Library Name	File Name	Coverage From
Lehigh Valley Business Digest*	NEXIS	BDLV	1/85

Libya Country Reports***	REPORT	LIBYA	1/87
Library Software Review*	CMPCOM NEXIS	LSFTR	7/88
Life	NEXIS	LIFE	1/82
Link-Up*	CMPCOM NEXIS	LINKUP	7/88
London Business Monthly Magazine*	INTNEW NEXIS	WOB	3/87
Long Distance Letter, The*	CMPCOM NEXIS	LDLTR	1/90
Los Angeles Business Journal, The*	NEXIS	LABJ	8/87
Los Angeles Magazine*	NEXIS	LAM	5/88
Los Angeles Times	INTNEW NEXIS	LAT	1/85
Los Angeles Times Biographical Stories	NEXIS PEOPLE	LATBIO	1/90
Lotus Magazine*	CMPCOM NEXIS	LOTUS	1/88
Louisville*	NEXIS	LOU	1/85

Louisiana Bill Tracking	LEGIS	LATRCK	4/90
Louisiana Legislation (Slip laws)	LEGIS	LAALS	1990
Lyme Disease Background News***	BACKGR	LYME	Current
M			
M&A Europe	BANKS EUROPE INTNEW NEXIS	MAEUR	1/90
MM&M Medical Marketing & Media*	MARKET NEXIS	MEDMKT	1/90
MTI Econews	INTNEW EUROPE NEXIS	MTI	10/90
Mabon, Nugent & Company	COMPNY INVEST	MNC	10/86
Machine Design*	NEXIS	MACDSN	1/83
Maclean's	INTNEW NEXIS	MCLEAN	1/85

MacNeil/Lehrer NewsHour, The	CMPGN EXEC NEXIS	MACLEH	1/82
MacUser*	CMPCOM NEXIS	MACUSR	1/88
MacWeek*	CMPCOM NEXIS	MCWEEK	1/88
Magazine of Bank Administration, The	BANKNG BANKS NEXIS	BNKADM	1/81
Maine Bill Tracking	LEGIS	METRCK	12/88
Maine Legislation	LEGIS	MEALS	1989
Malaysia Country Reports***	REPORT	MALAY	1/87
Manchester Guardian Weekly	EUROPE EXEC INTNEW NEXIS	MAGRWK	1/81
Manhattan Lawyer	GENFED	MNLAWR	9/87

Manitoba Business*	LEGNEW NEXIS INTNEW NEXIS	MAN	1/85
Market Guide Database	COMPNY	MG	Current
Market Reports	EUROPE REPORT	MKTRPT	1987
Market Research Europe*	INTNEW MARKET NEXIS	MKTEUR	1/90
Marketing*	MARKET NEXIS	MRKTNG	1/90
Marketing News*	MARKET NEXIS	MKTNWS	1/90
Martindale-Hubbell® Law Directory Practice Profiles	PEOPLE	MHPROF	1991 Edition
Maryland Bill Tracking	LEGIS	MDTRCK	9/90 -
Maryland Department of Assessments and Taxation	COMPNY	MDSDAT	Current
Maryland Department of Assessments	COMPNY	MDUCC	10/84

and Taxation Uniform Commercial Code Information			
Maryland Legislation (Slip laws)	LEGIS	MDALS	1989
Massachusetts Bill Tracking	LEGIS	MATRCK	12/90
Massachusetts Full Text Legislation (Pending bills)	LEGIS	MATEXT	1/91
Massachusetts Lawyers Weekly	LEGNEW NEXIS	MALAWR	1/91
Massachusetts Legislation (Slip laws)	LEGIS	MAALS	1990
Massachusetts Secretary of State – Corporation and Limited Partnership Information	COMPNY	MASOS	Current
– Uniform Commercial Code Filings	COMPNY	MAUCC	Current
Mass Murder Background News***	BACKGR	MURDER	Current
McDonald & Co. Securities, Inc.	COMPNY INVEST	MCD	11/89
McIntosh Hamson Hoare Govett Ltd.	COMPNY INVEST	MIH	7/90
Media Week	MARKET	MEDIWK	1/83

	NEXIS		
MEDLINE®, The National Library of Medicine	MEDLNE		1966
Memphis Business Journal*	NEXIS	MBJ	3/85
Mercer Business Journal*	NEXIS	MCB	4/85
Mergers & Acquisitions	BANKS	MA	1/90
	NEXIS		
Mergers & Acquisitions Report	BANKS	IDD	1/90
	NEXIS		
Merrill Lynch Pierce Fenner & Smith Inc.	COMPNY	MER	9/88
	INVEST		
Metals Week	NEXIS	METLWK	1/81
Metalworking News* (includes Iron Age)	NEXIS	MTLNWS	1/83
Metropolitan Toronto Business Journal*	INTNEW	BJM	5/85
	NEXIS		
Mexico Country Reports***	REPORT	MEXICO	1/87
Michigan Bill Tracking	LEGIS	MITRCK	Current

Michigan Business*	NEXIS	MICH	7/86
Michigan Department of Commerce Information	COMPNY	MICOMM	1821

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 12

Title	Library Name	File Name	Coverage From
Michigan Full Text Legislation (Pending bills)	LEGIS	MITEXT	1/91
Michigan Lawyer's Weekly	LEGNEW NEXIS	MILAWR	1/91
Michigan Legislation (Slip laws)	LEGIS	MIALS	1990
MICROMEDEX™			
DRUGDEX®			
– Drug Consults	GENMED	CONSLT	Current
– Drug Evaluations	GENMED	EVAL	Current

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EMERGINDEX®			
– Clinical Abstracts	GENMED	ABSTR	Current
– Clinical Reviews	GENMED	DISEAS	Current
POISINDEX®			
– Poison Management	GENMED	POISON	Current
Microsoft Systems Journal*	CMPCOM NEXIS	MICRO	1/88
Middle East Executive Reports	PATENT NEXIS	MDEAST	9/78
Mideast Markets	INTNEW NEXIS	MEM	1/89
Mini-Micro Systems*	CMPCOM NEXIS	MMSYS	1/88
Mining Annual Review	ENRGY NEXIS	MINREV	1981
Mining Journal	ENRGY NEXIS	MINJNL	1/81
Mining Magazine	ENRGY NEXIS	MINMAG	1/81
Minneapolis-St. Paul CityBusiness*	NEXIS	MNCB	3/85

Minnesota Bill Tracking	LEGIS	MNTRCK	1/89
Minnesota Legislation (Slip laws)	LEGIS	MNALS	1989
Mississippi Bill Tracking	LEGIS	MSTRCK	1/90
Mississippi Legislation	LEGIS	MSALS	1989
Mississippi Business Journal*	NEXIS	MISS	1/86
Missouri Bill Tracking	LEGIS	MOTRCK	1/89
Missouri Legislation (Slip laws)	LEGIS	MOALS	1988
Missouri Secretary of State Corporate Information	COMPNY	MOINC	1808
Modern Brewery Age*	NEXIS	MODBRW	1/90
Modern Healthcare	NEXIS	MHC	1/90
Modern Office Technology*	CMPCOM NEXIS	MOTECH	1/83
Money	BANKS NEXIS	MONEY	1/82
Money Laundering Alert	BANKS INTNEW NEXIS	MLA	10/89
Montana Bill Tracking	LEGIS	MTTRCK	5/90
Montana Legislation (Slip laws)	LEGIS	MTALS	1989

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Monthly Labor Review*	EXEC NEXIS	MLABOR	9/84
Monthly Report On Europe+	EUROPE	MONREP	1/90
Morgan Stanley & Co. Incorporated	COMPNY INVEST	MRG	6/86
Morocco Country Reports***	REPORT	MOROCC	1/87
Motor Age*	NEXIS TRAN	MTRAGE	1/89
Multinational Service+	EUROPE	MULSRV	1/89
N			
Nashville Business Journal*	NEXIS	NASH	7/67
Nation, The*	EXEC LEGIS NEXIS	NATION	1/64
National Association of Insurance Commissioners Proceedings	INSRLW INSURE	NAIC NAIC	12/49
National Food Review*	NEXIS	NFOODR	1/89

National Institute Economic Review*	INTNEW NEXIS	ECOREV	1/89
National Journal	CMPGN EXEC GENFED LEGIS NEXIS	NTLUNL	1/77
National Law Journal, The	GENFED LEGNEW NEXIS	NTLAWJ	1/83
National Petroleum News	ENRGY NEXIS	PETNWS	1/83
National Real Estate Investor*	BANKS NEXIS	NREST	1/90
National Review*	EXEC IMMIG LEGIS NEXIS	NTLREV	1/83
National Underwriter Life & Health Financial Services	INSURE NEXIS	NULFE	1/88

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National Underwriter Property Casualty/Risks & Benefits	NSUPE NEXIS	???	1/88
Nation's Business*	NEXIS	NTNBUS	1/83
Nation's Restaurant News*	NEXIS	NTNRST	2/83
Nebraska Bill Tracking	LEGIS	NETRCK	1/89
Nebraska Legislation (Slip laws)	LEGIS	NEALS	1989
Netherlands Country Reports***	REPORT	NETHER	1/87
Network World	CMPCOM NEXIS	NWW	3/86
Networking Management	CMPCOM NEXIS	???	1/88
Nevada Bill Tracking	LEGIS	NVTRCK	12/88
Nevada Legislation (Slip laws)	LEGIS	NVALS	1989
Nevada Corporation Information	COMPNY NEXI	NVSCS	1880
New England Business*	NEXI	NEB	4/85
New Hampshire Bill Tracking	LEGIS	NHTRCK	1/89
New Hampshire Legislation (Slip laws)	LEGIS	NHALS	1989
New Hampshire Business Review*	NEXIS	NHBR	5/85

New Jersey Bill Tracking	LEGIS	NJTRCK	1/90
New Jersey Legislation (Slip laws)	LEGIS	NJALS	1989
New Jersey Full Text Legislation (pending bills)	LEGIS	NJTEXT	1/9_
New Jersey Law Journal	LEGNEW NEXIS	NJLAW	1/9_
New Jersey Success*	NEXIS	NJS	1/8_
New Leader, The*	EXEC NEXIS	NEWLD?	5/8_
New Media Markets	INTNEW NEXIS	NEWMED	1/8_
New Mexico Bill Tracking	LEGIS	NMTRCK	1/9_

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ALPHABETICAL LIST 13

	Library	File	Coverage

Title	Name	Name	From
New Mexico Legislation (Slip laws)	LEGIS	NMALS	1989
New Mexico Business Journal™	NEXIS	NMEX	1/85
New Orleans CityBusiness*	NEXIS	NOCB	4/85
New Republic, The	EXEC LEGIS NEXIS	NEWREP	1/83
New York Bill Tracking	LEGIS	NYTRCK	12/88
New York Legislation	LEGIS	NYALS	1990
New York Law Journal	LEGNEW NEXIS	NYLAWJ	9/89
New York Times, The	NEXIS	NYT	6/80
– Biographical file	NEXIS PEOPLE	NYTBIO	6/80
– Biographical File-Government	EXEC PEOPLE	GOVBIO	6/80
New Zealand Country Reports***	REPORT	NZEAL	1/88
Newsday	NEXIS	NEWSDY	5/88
Newsweek+	NEXIS	NWEEK	1/75
Nigeria Country Reports***	REPORT	NIGERIA	1/88

North Carolina Bill Tracking	LEGIS	NCTRCK	1/89
North Carolina Legislation (Slip laws)	LEGIS	NCALS	1990
North Dakota Bill Tracking	LEGIS	NDTRCK	1/91
North Dakota Legislation (Slip laws)	LEGIS	NDALS	1991
North Sea Letter	ENRGY INTNEW NEXIS	NSL	1/89
North Sea Letter Monthly Rig Market Forecast	ENRGY INTNEW NEXIS	NSLRMF	1/89
Northeast Pennsylvania Business Journal*	NEXIS	NEPA	5/88
Northern Ontario Business*	INTNEW NEXIS	NONT	1/85
Norway Country Reports***	REPORT	NORWAY	1/88
Nuclear News	ENRGY NEXIS	NUNEWS	1/82
Nuclear Regulatory Commission Decisions	ENERGY ENRGY UTILTY	NRC	1/75

NuclearFuel	ENRGY NEXIS	NUFUEL	1/81
Nucleonics Week	ENRGY NEXIS	NUWEEK	1/81
O			
OEDC Observer	INTNEW EUROPE	OECD	1/89
OPIC (Overseas Private Investment Corp. Opportunity Bank)	REPORT	OPIC	1/90
Oakland Business*	NEXIS	OAK	1/86
Occupational Outlook Quarterly*	NEXIS	OCCOUT	6/83
Ocean State Business*	NEXIS	CSB	1/86
O'Dwyer's PR Services Report	MARKET NEXIS	PRSRVS	1/89
Official Kremlin International News Broadcasts	EXEC NEXIS	SOVNWS	1/87
Offshore	ENRGY NEXIS	OFFSHR	1/80
Ohio*	NEXIS	OHIO	1/86

Ohio bill tracking	LEGIS	OHTRCK	1/89
Ohio Legislation (Slip laws)	LEGIS	OHALS	1990
Ohio full text legislation (Pending bills)	LEGIS	OHTEXT	1/91
Ohio Business*	NEXIS	OHB	3/85
Oil & Gas Journal	ENRGY	OILGAS	1/78
Oil Crisis News***	NEXIS ENRGY INTNEW	CRISIS	Current
Oil Spill Background News***	BACKGR	OIL	Current
Oilweek*	ENERGY INTNEW NEXIS	OILWK	1/90
Oklahoma Bill Tracking	LEGIS	OKTRCK	2/90
Oklahoma Legislation (Slip laws)	LEGIS	OKALS	1989
ONLINE*	CMPCOM NEXIS	ONLINE	7/88
Oppenheim Finanzanalyse GMBH	COMPNY INVEST	OFA	9/90

Oppenheimer & Co., Inc.	COMPNY INVEST	OPP	12/84
Optical Information Systems	CMPCOM NEXIS	OPTINF	1/88
Orange County Business Journal*	NEXIS	OCBJ	1/85
Oregon Bill Tracking	LEGIS	ORTRCK	5/90
Oregon Legislation	LEGIS	ORALS	1989
Oregon Business*	NEXIS	OREG	3/87
P			
PAP	EUROPE INTNEW NEXIS	PAP	10/90
PC Computing*	CMPCOM NEXIS	PCCMPG	1/89
PC Magazine*	CMPCOM NEXIS	PC	1/85
PC Tech Journal*	CMPCOM NEXIS	PCTECH	1/88

PC User*	CMPCOM NEXIS	PCUSER	1/89
PC Week*	CMPCOM NEXIS	PCWEEK	8/83
PDQ			
– Cancer Information for Patients	GENMED	PIF	Current
– Cancer Terminology	GENMED	TERMS	Current
– Cancer Treatment Protocols	GENMED	PROTOC	Current
– Organization Directory	GENMED	ORGA	Current
– Physician Directory	GENMED	PERSON	Current
– State-of-the-Art Information	GENMED	STATE	Current
PIMA Magazine*	NEXIS	PIMA	1/90
PR Newswire	COMPNY MARKET NEXIS	PRNEWS	1/80
Pacific Business News*	NEXIS	PBN	1/85
Pacific Northwest Executive*	NEXIS	PNE	10/86
Packaging*	MARKET	PACKNG	1/89

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ALPHABETICAL LIST 14

Title	Library Name	File Name	Coverage From
PaineWebber Incorporated	COMPNY INVEST	PNW	4/85
Pakistan Country Reports***	REPORT	PAKI	1/87
Panama Country Reports***	REPORT	PANAMA	1/87
Panmure Gordon & Co. Ltd.	COMPNY INVEST	PMG	8/89
Paper*	NEXIS	PAPER	1/90
Pasfin Servizi Finanziari Spa	COMPNY INVEST	PSF	7/90

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Patents			
– Classification Information	LEXPAT	CLASS	Current
– Design	LEXPAT	DESIGN	12/76
– Index to U.S. Patent Classification	LEXPAT	INDEX	Current
– Manual of Classification	LEXPAT	CLMNL	Current
– Plant	LEXPAT	PLANT	12/76
– Utility	LEXPAT	UTIL	1/75
Pediatrics	GENMED	PED	1/84
Pennsylvania Bill Tracking	LEGIS	PATRCK	1/90
Pennsylvania Legislation	LEGIS	PAALS	1989
Pennsylvania Full Text Legislation (Pending bills)	LEGIS	PATEXT	12/90
Pennsylvania Department of States Corporation/Limited Partnership Records	COMPNY	PASOS	1700
Pennsylvania Department of State Uniform Commercial Code	COMPNY	PAUCC	1954
Pennsylvania Trademark/Servicemark Information	COMPNY	PATM	Current

Pensions & Investment Age®	BANKS BANKNG INSURE NEXIS	PENINV	1/87
People	NEXIS PEOPLE	PEOPLE	12/81
Pershing Division of Donaldson Lufkin & Jenrette Securities	COMPNY INVEST	PER	8/83
Personal Computing*	CMPCOM NEXIS	PERSNL	1/89
Peru Country Reports***	REPORT	PERU	1/87
Peterbroeck, Van Campenhout & CIE	COMPNY INVEST	PCM	8/90
Petroleum Economist*	ENERGY ENRGY INTNEW NEXIS	PETECO	1/90
Petroleum Independent*	ENRGY INTNEW NEXIS	PETIND	1/90

Petroleum Times Price Report	ENRGY INTNEW NEXIS	PETMPR	1/90
Pharmaceutical Business News*	INTNEW NEXIS	PBNWS	1/89
Philadelphia Business Journal*	NEXIS	PHIL	7/85
Philippines Country Reports***	REPORT	PHIL	Current
Phoenix Gazette, The*	NEXIS	PHNXGZ	1/90
Pink Sheet, The (Drugs)	GENMED	PINK	1/84
Pipe Line Industry*	ENRGY NEXIS	PLIND	1/90
Pipeline*	ENRGY NEXIS	PIPLNE	1/90
Piper, Jaffray & Hopwood Inc.	COMPNY INVEST	PJH	4/83
Pittsburgh Business Times & Journal	NEXIS	PBT	4/83
Pittsburgh Post Gazette	NEXIS	PITTPG	7/90
Plant Engineering*	NEXIS PATENT	PLTENG	1/83

Plastics World	NEXIS	PLSWLD	1/89
Platt's Oilgram News	ENRGY NEXIS	PONEWS	1/81
Platt's Oilgram Price Report	ENRGY NEXIS	PPRICE	5/82
Poland Country Reports***	REPORT	POLAND	Current
Policy Review (Heritage Foundation)	EXEC LEGIS NEXIS	HFRPTS	Summer 1977
Popular Science*	NEXIS	POPSCN	1/83
Portugal Country Reports***	REPORT	PORT	Current
Power in Asia	ENRGY INTNEW NEXIS	PASIA	1/89
Power in Europe	ENRGY INTNEW NEXIS	PE	1/89
Prepared Foods	NEXIS	PFOODS	1/89
Presidential Documents	EXEC	PRESDC	1/81

Press Association Newsfile	EUROPE INTNEW NEXIS	PANEWS	7/89
Privat Profit	EUROPE INTNEW NEXIS	PPROFT	5/90
Progressive Architecture*	NEXIS	PROGAR	1/83
Progressive Grocer*	NEXIS	PROGGR	1/83
Proposed Treasury Regulations	EXEC	P-REGS	
Providence Journal-Bulletin, The*	NEXIS	PROV	2/88
Provident National Bank	COMPNY INVEST	PNB	11/88
Prudential-Bache Securities	COMPNY INVEST	PB	9/83
Psychology Today*	NEXIS	PSYTDY	9/85
Public Health Reports	GENMED	PHR	1/83
Public Laws	EXEC LEGIS	PUBLAW	Current
Public Relations Journal	MARKET	PRJNL	1/83

Public Utilities FORTNIGHTLY	NEXIS ENRGY NEXIS	PUF	7/88
Public Utility Commission Decisions	ENRGY NEXIS	ALLPUC	
Puerto Rico Legislation (In Engish)	LEGIS	PRALS	1988
Puget Sound Business Journal*	NEXIS	PSBJ	1/85
Pulp & Paper*	NEXIS	PULP	1/89
Pulp & Paper International*	NEXIS	PPINTL	1/89
Pulp & Paper Journal*	NEXIS	PPJNL	1/90

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 15

Title	Library Name	File Name	Coverage From

Q			
Quality Review Bulletin	HEALTH	QRB	1/84
Quick Frozen Foods International*	NEXIS	QKFROZ	1/89
Quotes (Real Time)	QUOTE		
– Quote finder		QF	Current
– Quote saver		QS	Current
– Dow Jones average		DJ	Current
– Standard & Poor's average		SP	Current
– NYSE average		NY	Current
– AMEX average		AM	Current
R			
RQ*	CMPCOM NEXIS	RQ	7/88
Raffensperger, Hughes & Co.	COMPNY INVEST	RPH	11/89
Ragen & Mackenzie	COMPNY INVEST	CHR	7/82
Rauscher Pierce Refsnes	COMPNY INVEST	RPR	11/83

Regardie's The Business of Washington*	NEXIS	REG	2/88
Regional Aviation Weekly	NEXIS TRAN	RAWKY	1/89
Report From Japan	INTNEW NEXIS	RPTJAP	1/89
Research & Development*	NEXIS	RD	1/83
Restaurant Business*	NEXIS	RSTBUS	1/83
Reuter Business Report, The	EUROPE INTNEW NEXIS	BUSRPT	5/87
Reuter Canadian Financial Report, The+	BANKS COMPNY INTNEW NEXIS	CANRPT	1/87
Reuter Financial Report, The+	BANKS EUROPE COMPNY INTNEW MARKET	FINRPT	1/87

Reuter Library Report, The+	NEXIS EUROPE INTNEW NEXIS	LBYRPT	12/81
Reuter Money Report, The+	BANKS EUROPE COMPNY NEXIS	MONRPT	1/87
Reuter News Reports+	MARKET NEXIS	REUTER	4/79
Rhode Island Bill Tracking	LEGIS	RITRCK	12/88
Rhode Island Legislation	LEGIS	RIALS	1989
Richardson Greenshields of Canada, Limited	COMPNY INVEST	RG	9/83
Roach Tilley Grice, Inc.	COMPNY INVEST	N/A	3/87- 9/90
Robert Fleming Inc.	COMPNY INVEST	RFI	11/83
Robert W. Baird & Co. Inc.	COMPNY	RWB	5/90

Robinson-Humphrey Company Inc., The	INVEST COMPNY	RHC	10/89
Rochester Business Journal*	INVEST NEXIS	ROCH	11/87
Roll Call	CMPGN LEGIS NEXIS	ROLLCL	1/89
Romania Country Reports***	REPORT	ROMANI	1/87
Rowan Dartington & Co. Securities Ltd.	COMPNY INVEST	RDT	9/90
S			
S&L Crisis News***	BANKS	S&L	1/90
SEC			
– 10-K Reports	COMPNY	10-K	7/87
– 10-Q Reports	COMPNY	10-Q	7/87
– 20-F Reports	COMPNY	20-F	1989
– Abstracts of Filings**			
– Forms 3 and 4	COMPNY	INSIDE	10/88

– Form 4	COMPNY	INSIDE	10/88
– Form 8-k	COMPNY	EVENTS	10/88
– Forms S-1, S-2, S-3, S-4, S-8 S-11, S-18	COMPNY	REGIS	10/88
– Schedules 13D, 13G, 14D-1, 14D-9 13E-3, 13E-4	COMPNY	ACQUIS	8/87
– News Digest	COMPNY EXEC	SECNEW	6/85
– Proxy Statements	COMPNY	PROXY	7/87
Sacramento Bee, The*	NEXIS	BEE	11/88
Sales & Marketing Management*	MARKET	SMMGMT	1/83
Salomon Brothers Inc.	NEXIS COMPNY INVEST	SB	8/88
San Antonio Business Journal*	NEXIS	SABJ	1/87
San Diego Business Journal*	NEXIS	SDBJ	4/85
San Francisco Business Magazine*	NEXIS	SFBM	4/85
San Francisco Business Times*	NEXIS	SFBT	1/87
San Francisco Chronicle	NEXIS	SFCHRN	10/89
Sanford C. Bernstein & Co.	COMPNY	SCB	3/89

Sanyo Investment Research Ltd.	INVEST COMPNY	SYO	11/84
Sarasota Magazine*	INVEST NEXIS	NEWB	5/85
Saskatchewan Business*	INTNEW	SASK	1/85
Satellite Communications*	NEXIS CMPCOM	SATCOM	1/90
Satellite News*	NEXIS CMPCOM	SATNWS	1/90
Saturday Evening Post*	NEXIS NEXIS	SEPOST	1/83
Saudi Arabia Country Reports***	REPORT	SAUDI	1/87
Scientific American*	NEXIS	SCIAMR	1/83
Scotia Mcleod Inc.	COMPNY	MYW	2/83
Scott & Stringfellow Inc.	INVEST COMPNY INVEST	SCT	9/89

Screen Finance	INTNEW NEXIS	SRNFIN	1/89
Seattle Business*	NEXIS	SEAT	2/86
Seattle Times, The	NEXIS	SEATTM	1/90

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 16

Title	Library Name	File Name	Coverage From
Securities Data Company	COMPNY INVEST	SDC	1/90
Securities Regulation & Law Report	EXEC NEXIS	SECREG	1/82
Securities Week	BANKS NEXIS	SECWK	1/81
Serial Killing Background News***	BACKGR	SERIAL	Current

Exhibit 49

Sexually Transmitted Diseases	GENMED	STD	1/83
Shearson Lehman Brothers Holdings, Inc.	COMPNY INVEST	SLH	2/88
Sheppards	COMPNY INVEST	SHE	1/90
Singapore Country Reports***	REPORT	SING	1/87
Small Computers in Libraries*	CMPCOM	CMPLIB	1/88
Smith Barney, Harris Upham & Co. Inc.	NEXIS COMPNY INVEST	SBH	6/82
Smith New Court Securities PLC	COMPNY INVEST	SNC	12/89
Smithsonian	NEXIS	SMTHSN	1/83
Soap-Cosmetic-Chemical Specialties*	NEXIS	SOAP	1/83
Soap Perfumery and Cosmetics*	NEXIS	SPCSM	1/90
Social Security Bulletin*	EXEC	SSBLTN	1/83
Societe Generale Straus Turnbull Securities, Ltd.	NEXIS COMPNY INVEST	STN	9/90
Software Magazine*	CMPCOM	SOFTNW	1/88

South Africa Country Reports***	NEXIS REPORT	SAFRIC	1/87
South Carolina Bill Tracking	LEGIS	SCTRCK	12/90
South Carolina Legislation	LEGIS	SCALS	1990
South Carolina Business Journal*	NEXIS	SCAR	9/85
South Dakota Bill Tracking	LEGIS	SDTRCK	1/90
South Dakota Legislation	LEGIS	SDALS	1989
South Florida Business Journal*	NEXIS	SFLA	1/85
Southern California Business*	NEXIS	SCB	2/85
Southern New Jersey Business Digest*	NEXIS	BDSN	1/85
Southwest Newswire	COMPNY MARKET NEXIS	SWNEWS	2/84
South Korea County Reports**	REPORT	KOREA	1/87
Soviet Press Digest	INTNEW EUROPE NEXIS	SPD	2/90
Spang Robinson Report, The	CMPCOM NEXIS	SRR	1/94

Spain County Reports***	REPORT	SPAIN	1/87
Sporting News, The	NEXIS	TSN	1/89
	SPORTS		
Sports Illustrated	NEXIS	SPORTS	12/81
	SPORTS		
Springfield Business Journal*	NEXIS	SPRN	8/87
St. Louis Business Journal*	NEXIS	SLBJ	5/85
Standard & Poor's			
– Corporate Descriptions	COMPNY	SPDESC	Current
– Daily News	COMPNY	SPNEWS	10/89
– Register			
– Corporations	COMPNY	SPCORP	Current
– Directors and Executives	COMPNY	SPBIO	Current
	PEOPLE		
Standard Industrial Classification Manual	COMPNY	SIC	1987 Edition
States News Service	CMPGN	SNS	8/84
	LEGIS		
	NEXIS		

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Stephens Inc.	COMPNY INVEST	SI	5/87
Stereo Review*	NEXIS	STEREO	1/83
Stock Beech Securities Limited	COMPNY INVEST	STB	4/89
Stuart-James Company Inc., The	COMPNY INVEST	STJ	6/90
Successful Business*	NEXIS	BUTO	6/87
Sun Hung Kai Research Ltd.	COMPNY INVEST	SHK	6/90
Sunset*	NEXIS	SUNSET	1/83
Supermarket Business*	NEXIS	SUPBUS	1/83
Supermarket News*	NEXIS	SUPNWS	1/83
Surgery, Gynecology & Obstetrics	GENMED	SGO	6/82
Survey of Current Business*	NEXIS	SRVBUS	2/83
Sutro & Co.	COMPNY INVEST	STR	6/88
Svenska International PLC	COMPNY INVEST	SVK	10/90
Sweden Country Reports***	REPORT	SWEDEN	1/87
Switzerland Country Reports***	REPORT	SWIT	1/87

Syracuse Business*	NEXIS	SYRA	1/85
Syria Country Reports***	REPORT	SYRIA	1/87
Systems Integration*	CMPCOM NEXIS	SYSINT	1/90
T			
3D*	CMPCOM NEXIS	3D	4/89
TASS (The Telegraph Agency of the Soviet Union)	EUROPE INTNEW NEXIS	TASS	1/87
T H E Journal*	CMPCOM NEXIS	TJRNL	1/88
TPT – Telecommunications Products	CMPCOM NEXIS	TPT	1/88
Taiwan County Reports***	REPORT	TAIWAN	1/87
Tax Adviser, The	NAARS	TAXADV	1987
Tax & Investment Profile	EUROPE REPORT	TAXINV	1/87
Tea and Coffee Trade Journal*	NEXIS	TCTRD	5/90

Technology Review*	NEXIS	TECHRV	1/83
Telecommunications*	CMPCOM NEXIS	TELE	1/88
Telecommuting Review: The Gordon Report*	CMPCOM NEXIS	GORDON	1/90
Teleconnect*	CMPCOM NEXIS	TELCON	1/90
Telephone News*	CMPCOM NEXIS	TELNWS	1/90
Telephony*	CMPCOM NEXIS	TPHNY	1/88

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 17

Title	Library Name	File Name	Coverage From

Tennessee Bill Tracking	LEGIS	TNTRCK	1/89
Tennessee Legislation	LEGIS	TNALS	1989
Texas Bill Tracking	LEGIS	TXTRCK	11/89
Texas Legislation	LEGIS	TXALS	1989
Texas Lawyer, The	LEGNEW NEXIS	TXLAWR	1/90
Texas Secretary of State			
– Corporate Information	COMPNY	TXINC	1860
– Sales and Use Tax	COMPNY	TXSALE	Current
– Uniform Commercial Code	COMPNY	TXUCC	Current
Thailand Country Reports***	REPORT	THAI	1/87
Thomas James Associates, Inc.	COMPNY INVEST	TJA	2/89
Thrift Liquidation Alert	BANKS NEXIS	THRIFT	10/89
Time	NEXIS	TIME	1/81
Times and The Sunday Times, The	EUROPE INTNEW NEXIS	TIMES	1/90
Toledo Business Journal*	NEXIS	TOL	5/87
Tornado Background News***	BACKGR	TORNAD	Current

Toronto Star, The	INTNEW NEXIS	TSTAR	1/90
Transportation & Distribution*	NEXIS	TRANS	1/83
Travel Weekly	NEXIS TRAN	TRVWKY	1/83
TRINET Company Database	COMPNY MARKET	TRICO	Current
TRINET Establishment Database	COMPNY MARKET	TRIEST	Current
Tucker, Anthony & R.L. Day, Inc.	COMPNY INVEST	TAD	10/85
Tulsa Business Chronicle*	NEXIS	TBC	2/85
Tulsa World*	NEXIS	TULS	2/88
Turkey Country Reports***	REPORT	TURKEY	1/87
U			
UBS Phillips & Drew Ltd.	COMPNY INVEST	PDI	5/84
UN Chronicle	NEXIS	UNCHRN	1/83

	EXEC		
UNESCO Courier*	NEXIS	UNESCO	1/83
United Arab Emirates	REPORT	UNARAB	1/87
Country Reports***			
United Kingdom Country Reports***	REPORT	UK	1/87
United States Country Reports***	REPORT	USA	1/87
Uruguay Country Reports***	REPORT	URUGUA	1/87
UNIX Review*	CMPCOM	UNIX	1/88
	NEXIS		
U.S. Distribution Journal*	NEXIS	USDIST	1/89
U.S. Department of State Dispatch	EXEC	DSPTCH	9/90
U.S. News & World Report	NEXIS	USNEWS	1/85
U.S. Newswire	CMPGN	USNWR	1/90
	EXEC		
	LEGIS		
	NEXIS		
U.S. Supreme Court Case List	GENFED	USLIST	Current
	LEGNEW		
U.S.S.R. Country Reports***	REPORT	USSR	1/87

USA Today	NEXIS	USATDY	1/89
USA Weekend	NEXIS	USAWKD	1/89
Union Bank of Switzerland	COMPNY INVEST	UBS	9/82
United Press International	NEXIS	UPI	9/90
United Press International State and Regional Wires	NEXIS	UPSTAT	11/80 to 12/89
		UPST90	1/90
United States Banker	BANKS NEXIS	USBANK	1/83
United States Code Service	EXEC LEGIS	USCODE	Current
United States Law Week	LEGNEW NEXIS	USLW	7/82
United States Law Week Daily	LEGNEW NEXIS	USLWD	6/87
United States Public Laws	EXEC	PUBLAW	100th

Universal News Services	INTNEW MARKET NEXIS	UNS	10/86
Utah Bill Tracking	LEGIS	UTTRCK	1/90
Utah Legislation	LEGIS	UTALS	1989
V			
Van Kasper & Company	COMPNY INVEST	VNK	4/84
Venezuela Country Reports***	REPORT	VENEZ	1/87
Vereins-und Westbank AG	COMPNY INVEST	VWB	10/89
Vermont Bill Tracking	LEGIS	VTTRCK	1/89
Vermont Legislation	LEGIS	VTALS	1990
Vermont Business Magazine*	NEXIS	VBW	1/86
Vickers Institutional Holdings	COMPNY	VICINS	Current
Vickers Securities Reports	COMPNY	VICSEC	Current
Video Market News*	MARKET NEXIS	VIDMKT	1/90
Virgin Islands Legislation (Slip laws)	LEGIS	VIALS	1989
Virginia Bill Tracking	LEGIS	VATRCK	1/90

Virginia Legislation (Slip laws)	LEGIS	VAALS	1989
W			
W.I. Carr Limited	COMPNY INVEST	WIC	4/90
WIS Country Data Forecasts	EUROPE REPORT	WISFOR	Current
WIS Country Outlooks	EUROPE REPORT	WISOUT	1/90
WIS Country Risk Monitor	EUROPE REPORT	WISMON	Current
Wall Street Computer Review*	CMPCOM NEXIS	WSCMP	1/88
Wall Street Journal** (abstracts)	NEXIS	WSJ	5/73
Ward's Auto World*	NEXIS	WARDS	1/83
Warsaw Voice, The	EUROPE INTNEW NEXIS	WRSAWV	9/90

Washington State Bill Tracking	LEGIS	WATRCK	2/90
Washington State Legislation (Slip laws)	LEGIS	WAALS	1989
Washington Business Journal*	NEXIS	WBJ	1/85
Washington Monthly*	EXEC	WSHMTH	7/85
	NEXIS		

*Selected full text **Abstracts ***Selected documents +Not available to all customers

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ALPHABETICAL LIST 18

Title	Library Name	File Name	Coverage From
Washington Post, The	EXEC	WPOST	1/77
	INTNEW		
	LEGIS		
	NEXIS		
Washington Post Biographical Stories, The	CMPGN	WPBIO	1/89
	EXEC		
	NEXIS		

Washington Quarterly, The	PEOPLE EXEC	WASHQR	Winter 1982
Washington Times, The	EXEC INTNEW LEGIS NEXIS	WTIMES	7/89
Wedbush Morgan Securities, Inc.	COMPNY INVEST	WDM	9/89
Weekly of Business Aviation,™ The	NEXIS TRAN	WBA	1/89
Wertheim Schroder & Company	COMPNY INVEST	WRS	2/89
West Germany Country Reports***	REPORT	WGER	1/87
West Virginia Bill Tracking	LEGIS	WVTRCK	1/90
West Virginia Legislation (Slip laws)	LEGIS	WVALS	1990
Westchester County Business* Journal, The	NEXIS	WNYB	11/87
Wheat First Butcher & Singer, Inc.	COMPNY INVEST	BUS	6/83
Which Computer?*	CMPCOM	WHCMP	1/89

	NEXIS		
Whole Earth Review*	NEXIS	ERTHRV	5/85
Wichita Business*	NEXIS	WICH	3/85
Wichita Business Journal*	NEXIS	WKBJ	11/87
William Blair & Company, Inc.	COMPNY INVEST	WBC	3/90
Wisconsin Bill Tracking	LEGIS	WITRCK	1/89
Wisconsin Legislation (Slip laws)	LEGIS	WIALS	1987
Wisconsin Secretary of State Corporate & Limited Partnership Information	COMPNY	WISOS	1841
Woman Inc.*	NEXIS	WINC	9/87
Woman of the Times*	NEXIS	WOTT	10/87
Women's Wear Daily*	NEXIS	WWEAR	1/83
Wood World*	NEXIS	WWOOD	1/90
Working Woman*	NEXIS	WWOMAN	1/83
World Accounting Report	BANKNG INTNEW	WAR	1/89

World Corporate Insurance Report	NEXIS INSURE INTNEW	WCINSR	1/89
World Factbook, The	NEXIS EUROPE REPORT	WOFACT	1990
World Financial Markets	BANKING BANKS NEXIS	WLDFIN	1/82
World Insurance Report	INSURE INTNEW BANKS NEXIS	WLDINS	1/88
World Oil*	ENRGY NEXIS	WLDOIL	1/89
World Policy Guide	INSURE INTNEW NEXIS	WPG	1/89

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World Tax Report	INTNEW BANKS NEXIS	WLDTAX	1/88
WorldPaper	NEXIS	WPAPER	1/83
Wyoming bill tracking	LEGIS	WYTRCK	2/90
Wyoming Legislation (Slip laws)	LEGIS	WYALS	1989
X			
Xinhua (New China) News Agency	INTNEW NEXIS	XINHUA	1/77
Y			
Yamaichi Research Institute of Securities & Economics, Inc.	COMPNY INVEST	YAM	10/82
Yugoslavia Country Reports***	REPORT	YUGO	1/87
Z			
Zacks Investment Research, Inc.	COMPNY	EARN	Current

*Selected full text **Abstracts ***Selected documents +Not available to all customers

Exhibit 49

Exhibit 49

LEXIS/NEXIS Promotional Materials

M003220

LEXIS·NEXIS

What is LEXIS®/NEXIS®?

It's a set of electronic libraries. In fact, it's the world's most comprehensive collection of legal, news and business information sources that you access through your PC, laptop or terminal.

It's easy and quick. You find the information you want using simple commands in plain English, not complicated computer jargon. In a matter of seconds, the information you request will appear on your computer screen.

What Does It Do For You?

It saves you time and money. When you consider the costs of collecting, storing and archiving trade publications, newspapers, reference data and case law — or the time spent to search hardcopy libraries — the LEXIS/NEXIS services are quite affordable. You spend your time using information, not looking for it.

It helps you better serve your clients. The LEXIS/NEXIS services can help you stay abreast of your clients' operations in a specific country or worldwide by providing financial information, officer and director names, recent and continuing updates on news stories and press releases, and names of other organisations doing business with your clients as well as lawsuits involving your clients.

Exhibit 49

What Is It Made Of?

News sources: Hundreds of international, national and regional publications, such as *The New York Times*, Associated Press, Reuters, *Financial Times (of London)*, *Le Monde* and the *Financial Post*.

Trade publications: Respected sources such as *BNA International Dailies, E.I.U.*, and *East European Business Law*.

Financial reports: In-depth reports and financials on companies and industries from Investext®, Disclosure®, Extel and CanCorp Plus.

Legal material: Case law and various legal documents from the U.S., Canada, Europe, Australia and other world regions. Also available is the North American Free Trade Agreement and exclusive treaty material from OCEANA.

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EXHIBIT 50 — GPO PROMOTIONAL MATERIALS (U001454); UMI INTEROFFICE MEMOS (U007749-U007750)

U001454

GENERAL PERIODICALS

ONDISC

Full-Text Information from General-Reference Sources

General Periodicals Ondisc (GPO) provides exact reproductions of articles in image format from approximately 200 of the most frequently used general-interest periodicals. With a few keystrokes, users can search UMI's Periodical Abstracts index database, calling up citations and abstracts for articles relevant to the search topic, then view and print laser copies of selected articles.

GPO comprises three major components:

- **Periodical Abstracts Ondisc database** — bibliographic citations and abstracts for articles from 450 general-interest periodicals (950 by the end of 1991)

- **General Periodicals Ondisc database** — a full-text CD-ROM collection containing articles from approximately 200 of the titles indexed in the Periodical Abstracts database

- **ProQuest 3000 series workstation** — a state-of-the-art system including all hardware and software needed to search for and retrieve articles

Exhibit 50

COVERAGE

General Periodicals Ondisc features cover-to-cover reproduction of approximately 200 of the most requested general-interest periodicals, January 1989 forward. Your initial subscription will include over 200 discs (about 80 of them supplied in the first shipment); every year we add about 70 discs, each of which contains over 4,000 pages. GPO and its companion database Periodical Abstracts will help you locate and retrieve information about:

arts	commentary
consumer issues	education
literary reviews	lifestyles
business	computers
current events	health
politics	science

. . . and much more.

FREQUENCY

Periodical Abstracts Ondisc and General Periodicals Ondisc are updated monthly, concurrent with one another to ensure corresponding coverage between databases.

ACCESS

General Periodicals Ondisc combines the ease of use and versatility of UMI's ProQuest search software with full-text capability, allowing researchers to quickly identify and retrieve articles of interest. Users search the abstract-and-index database, locating and reviewing relevant citations and abstracts, then retrieve and print complete article copies from the image database — all with just a few keystrokes. The

system's Periodical Directory can also be used to retrieve articles directly when the user already has a specific citation.

SUBSCRIPTION

A 12-month subscription includes both databases, plus:

- image retrieval and output workstation
- all system and application software
- connector for debit card reader or coin box*
- disc storage carousels
- online help
- user's guide and other documentation
- installation and technical guide
- keyboard template
- quick-reference card
- complete installation *and* service. Your routine and emergency service needs will be met, at NO additional charge, by a nationwide network of trained field service representatives

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Exhibit 50

U007749

UMI INTEROFFICE MEMO

To: Blake Ratcliffe
From: Peggi Clark
Date: July 6, 1993
Subject: Copyright Issues

When I recently attended the Association of American University Presses conference, a major point of discussion was, "who owns copyright to faculty produced articles, the author or the university". The general consensus, from both the university and legal communities, was that the authors of intellectual expression own their own work. There is a whole new consciousness as to what copyright means and where it goes.

University presses and other publishers (i.e., National Geographic) who do not own all the articles/photographs contained within their publications cannot participate with vendors such as UMI due to their copyright concerns. It appears that it would be in our best interest to begin pursuing rights directly from authors/photographers in addition to our standard procedure of soliciting rights from the journal publisher. Attempting to secure rights at the author level would mean a major overhaul of our current process but it seems that in order to continue providing the quality products that customers expect from UMI we must find a way to deliver all of the information available in any given subject area. Presently, we cannot provide access to much of the relevant material being written due to our inability to obtain rights through our publisher contacts.

Exhibit 50

We have already begun suggesting to publishers that the contractual language in their arrangements with contributing authors/photographers should be worded so that further distribution, in any format, is covered. This will help a great deal, but will still not provide us with access to all other copyrighted material — perhaps, by executing an author agreement (when necessary) on behalf of UMI, we could get at material not presently available to us.

cc: D. Billick
P. Malcolm
R. Noble
J. Riedel
N. Smith
K. Tillman

Exhibit 50

U007750

UMI INTEROFFICE MEMO

To: Ken Tillman
From: Peggi Clark
Date: April 19, 1993
Subject: Publisher reprint concerns

I have received a letter from the National Geographic Society (copy attached) stating the possibility that they may not be renewing our electronic distribution agreement when the term is up, due to legal concerns regarding copyright. Since this is a subject we have been discussing at length recently, I felt it would be helpful to note that the problem has developed to a point that it is now placing our agreements with top publishers in jeopardy. While the Society has not terminated, there is a definite possibility they will hold off in renewing at the end of the term in June if their contractual arrangements with contributors are not changed to accommodate electronic distribution. Paul Tylor is working very hard to preserve the arrangement between UMI and the Society but over the last month or so has found that he may be fighting a losing battle. As this issue arises with other publishers we may find we do not have this kind of support in holding off termination.

cc: B. Ratcliffe
P. Malcolm
R. Noble

TRANSCRIPT OF ORAL ARGUMENT, OCTOBER 17, 1996, pp. 1, 6-8, 14, 24-25, 39-43, 48, 51-53, 56, 65-68, 78

Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, et al.

Plaintiffs,

v.

THE NEW YORK TIMES CO., et al.,

Defendants.

October 17, 1996
3:30 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

Transcript of Oral Argument

APPEARANCES

EMILY M. BASS
Attorney for Plaintiffs

DEBEVOISE & PLIMPTON
Attorneys for Defendants
BY: BRUCE P. KELLER
LORIN REISNER

* * *

[6] THE COURT:

Let's follow that argument down, Mr. Keller.

Let's start from the beginning.

Do you concede that an author who gives an article to a newspaper like the New York Times, and I know Newsday and others are implicated here, but for the sake of argument today, I'm grouping the three. For the New York Times, that author retains the right-to take that article and have it published in a different methodology if he chose to.

MR. KELLER: Absolutely. In fact, your Honor, there is testimony in the record that every single one of the plaintiffs did that.

THE COURT: They retained that right?

MR. KELLER: Absolutely.

Transcript of Oral Argument

THE COURT: Could they, if they chose, sell their individual article to Nexis?

MR. KELLER: Yes, they could.

THE COURT: If Nexis had an interest?

MR. KELLER: Yes, they could, your Honor.

* * *

[7] * * *

THE COURT: Let me continue with the logic. Is computer database entitled to copyright protection?

Can Nexis stop other people from taking its database?

MR. KELLER: Under very many circumstances of course, yes.

THE COURT: All right. So that database has elements that are protected under the copyright law?

MR. KELLER: Yes. But your Honor I think I see [8] where you are headed. I think —

* * *

Transcript of Oral Argument

[14] * * *

. . . take your point about contracts, but let's start with the fact that there are no contracts here.

THE COURT: I agree.

MR. KELLER: Congress said, look, how are we going to treat the relationship between contributors to periodicals and the periodical publishers in the absence of an express agreement. This happens so often that we need to create an automatic default mechanism. They did that in 201(c).

* * *

[24] * * *

MR. KELLER:

* * *

Let me come back to something we got off of, and that's the breadth of the definition of "any revision." It is very clear from the legislative history that this was a point on which many people were focused. They decided that any revision includes the right to remove up to 50 percent or more of the original material that appeared in the collective work. That's right in the legislative history.

There's a couple of places in the legislative [25] history where the people who were involved in negotiating what the scope of the 201(c) compromise would be talked about taking

things out, adding new things, rearranging contributions. That is what is done with respect to each of the media here . . . .

* * *

[39] * * *

MS. BASS:

* * *

[40] It is in fact on the basis of that digital electronic image of the collective work that the paper is printed. Not, as the defendants have said many, many, many times on the basis of the original computer text files that are processed and sent to Nexis. As soon as the composing room transmits the digital or electronic image of the collective work to the printing plant so that the paper can be produced, what do the publishers do? They disregard every embodiment of the collective work. They're no longer interested in the collective work because in point of fact once it's out on the street and once it has been on sale for 24 hours on the street, the collective work really has no economic value to that.

* * *

THE COURT: Let's take a break. You're still not leading me to microfilm and why that's different.

(Recess)

MS. BASS: I will try to get right to the point, your Honor, with respect to the microfilm.

THE COURT: Don't worry. I have plenty of other questions. We're not quite finished yet, but I am most interested in the microfilm and how analytically you draw a distinction between that and the CD-ROM imaging.

[41] MS. BASS: Let me say two things about that, your Honor.

First of all, the decision not to sue for infringement based on the fact that they create microfilm copies of the New York Times was really a decision that was made as a practical matter because there was a feeling among the plaintiffs that this was something that in effect was prepared for research libraries and was not something that was tremendously profitable and would deprive them of real economic opportunities. So it was more a practical decision not to sue for copyright infringement on that ground.

But let me get to the conceptual question that your Honor has asked because I do think that it is possible, and I believe that I have conceded this to opposing counsel previously, that I think it's possible that the right to make microfilm editions of a publication or a periodical is encompassed by the 201(c) privilege.

The distinction that I draw is this, your Honor: When you make a microfilm edition of the New York Times or a microfilm copy of the New York Times, what you are doing is reproducing and distributing the entire collective work and

everything in the collective work, and you are only reproducing and distributing individual contributions as part of that collective work and not as separate and apart from it. So I believe that it is possible that, although I [42] don't find any discussion —

THE COURT: My problem with that concession, because that accepts his argument that reproduction and distribution is governed by the definition of copies, is how do you then distinguish, not the ASCII CD-ROM, but for lack of a better description —

MR. KELLER: The image based?

THE COURT: The image based. What you see is the newspaper as a collective whole.

MS. BASS: Let me say several things about that, your Honor. First of all, I don't concede that the word "copies" appears anywhere in Section 201(c). But let's put that aside for the moment. I do believe that when you create a microfilm edition that you are reproducing and distributing the entire collective work and individual distributions only as part of the collective work.

The distinction that I make between microfilm, which I think may be encompassed by the 201(c) privilege in conjunction with the privilege that is set forth in section 109, I believe it's (d), your Honor, is that it's clear —

THE COURT: 109(d) is the library exception.

Transcript of Oral Argument

MS. BASS: No. 109(d) relates to the privilege.

MR. KELLER: The first sale doctrine, your Honor.

THE COURT: OK.

MS. BASS: The privilege that the owner of a [43] copyrighted work has to display that one work to those people in the immediate presence of the work. So I think that between 201(c), which might give them the right to reproduce and distribute, and 109(d), which would, I believe, give them the right to display the microfilm to the person sitting immediately in front of it, I do distinguish between that and the creation of image product CD-ROMs.

* * *

[48] * * *

If you only had a pure image product that was created by a process of scanning an entire edition of the New York Times and placing an image of the entire New York Times on a CD-ROM disk and then displaying that disk as provided for under 109(c), then I might agree that that was analogous to a microfilm process.

* * *

[51] MS. BASS: So that I would agree if we had a CD-ROM that didn't have the text-only half of the database or CD-ROM product, but was a pure image CD-ROM product and it were lawfully made, which they have the burden of

proving under the act, and it were displayed in the limited fashion provided for under 109(c), which provides that it can only be displayed one image at a time to viewers present at the place, I would say, yes, that image-only or pure-image CD-ROM product would, like a microfilm product, probably not be a violation of the contribution author's works.

But that's not what we have in this case.

THE COURT: I have to tell you that I am not at all convinced that you've really explained to me in reading 109(c) the display right it is giving is to take the copy, the lawfully made copy and to have the copy and the viewer in the same place, but project the copy on a screen. I think this was the sort of situation where a teacher has an article and has it with them and they want somebody in the audience to see the graph. That is what this reads like.

If one reads it, it says the copy and the viewer must be present in the same location. So I'm still not sure how microfilm has an exception in law. Because microfilm does not have the copy present in the same — I mean, there are some libraries in which the microfilm and the copy of the newspaper are present, but that's the rarity. Most [52] libraries use microfilm because it is an alternative storage mechanism.

MR. KELLER: Your Honor —

THE COURT: Let Ms. Bass finish, Mr. Keller. She was more than patient when you were talking. You have to give her the same courtesy. I am sure there were ample times

when she wanted to get up and dispute something you were saying and she didn't.

Go ahead.

MS. BASS: I would agree with your Honor that they have the right under 201(c) and 109(c) to take plaintiff's work without their permission and put it in a microfilm. But conceptually I'm not sure what the answer is.

I can see that there might be a distinction or might be an argument under those two provisions why they might be entitled to do that. But even if they're entitled to do that, they are clearly not entitled to put the individual articles on line on Nexis. They are clearly not entitled to put the individual articles and incorporate them into the CD-ROM ASCII text-only database, and I believe that they are clearly not entitled to put the individual articles, to incorporate those individual articles into the text-only part of the General Periodicals on Disk database.

[53] * * *

They keep on saying, your Honor, that 201(c) gives them the right to reproduce and distribute copies of contributions. It does not. They continue to try to delete from the act the very critical words that they can only reproduce and distribute as part of the collective work, as part of that collective work, a revision of that collective work or a subsequent collective work in the same series.

* * *

Transcript of Oral Argument

[56] * * *

THE COURT: Could I have one or more of you, that is, the side who has greatest access to this, I have Nexis on computer so I have access to it. Could someone get me the two CD-ROMs, not to give me to keep, but give me as court exhibits the two examples of the two CD-ROM mechanisms so that I can use my —

MR. KELLER: We will arrange for that, your Honor.

* * *

[65] MR. KELLER:

* * *

If, as your Honor suggests, somehow because an individual user can go to a particular article — there are two responses: First, that is also true whatever the medium. It has always been true that with the Reader's Guide. An index is published by the New York Times since the early 1900s, and, indeed, in every week's issue of Sports Illustrated, one can use the table of contents. Any of these things allow you to go to one particular article and use it and read it and copy it.

THE COURT: No, counsel. They permit you to go [66] to that collective work. They permit you to go to the book; they permit you to go to the newspaper. Those indexes or digests permit you to go to the work. Here, you are purposely recasting, transforming the work into a computer format and

not making the viewer go to the collective work. You are letting him or her use the individual articles. That's their argument.

MR. KELLER: Yes, it is. We don't deny that it's possible to do that. That's not worth denying. It's obviously possible to do that . . . .

* * *

[67] * * *

Yes, you can get an individual article, but also undisputed is that you can get the rest of the collective work if that's the type of research that you are doing.

* * *

THE COURT: I don't know anyone who does research merely by accessing the New York Times as such. They do the New York Times and a subtopic, whether it is a country, an author, a subject matter, an animal, color, thing or flavor. It is not the New York Times that they are accessing or a particular date except in some very unusual circumstances. It is a topic.

[68] MR. KELLER: There is no question about that, your Honor.

* * *

Transcript of Oral Argument

[78] MS. BASS: . . . We have not made end users parties to this litigation. We have not claimed that any end users have engaged in acts of direct infringement, and we have not in fact claimed that either the publisher defendants or the database defendants are guilty of contributory or vicarious liability with respect to direct infringement committed by end users.

THE COURT: With respect to end user infringement, you are talking about infringement merely in the act of —

MS. BASS: Placing it on line, making it available on line, and the act, precisely because it says that copies can appear in all media, and when you reproduce and distribute a copy, even if it's on glass, even if it's in plastic, even if it's in a computer server, if it's an electronic file, that can be an act of infringement. You can have acts of infringement created by virtue of creating machine readable copies of something.

* * * *

TRANSCRIPT OF CD-ROM DEMONSTRATION AND ARGUMENT, DECEMBER 10, 1996, pp. 1, 33-35

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, et al.

Plaintiffs,

v.

THE NEW YORK TIMES, et al.,

Defendants.

December 10, 1996
3:10 p.m.

Before:

HON. SONIA SOTOMAYOR,

District Judge

APPEARANCES

EMILY M. BASS
Attorney for Plaintiffs

DEBEVOISE & PLIMPTON
Attorneys for Defendants
BY: LORIN L. REISNER

Transcript of CD-ROM Demonstration and Argument

Also Present:
Douglas Yoon and Glenn Williams, Technical Experts/ Consultants for plaintiffs;
Dan Arbour, Vice-president of Marketing, UMI; and
Michael Hoover, Advanced Applications Representative, UMI

* * *

[33] * * *

MS. BASS: One concern I have, your Honor, and I guess I wanted to preface my remarks and the small demonstration that we will have for the court as well by a couple of more general comments. My feeling is that the United States Supreme Court has made a very, very clear distinction that the defendants have ignored in terms of this demonstration, and that's a distinction between creating and distributing infringing works and making and selling machines or equipment that can be used by others to infringe works.

It seems to me that the United States Supreme Court has very clearly said that where the charge or the [34] claim is that somebody is selling a machine that can be used by others to infringe works, then the analysis that you go through is whether the machine is capable of substantial non-infringing uses. And if it is, then the court has quite clearly said that the machine cannot be made the basis or won't be made the basis of a claim of contributory infringement.

And it seems to me that, to some extent, they have fashioned their demonstration in an effort to say to the court,

look at our machinery, look at the fact that our equipment can be used both for infringing uses and perhaps some non-infringing uses as well, and given the fact that it can be used for some non-infringing uses, the court should ala the principles in Sony v. Universal City Studios, excuse the fact that we also have committed infringements of the plaintiff's works.

And one of the things that I wanted to make clear from our perspective ~~is~~ what we are complaining about and what we aren't complaining about. This is not a case in which we have accused the defendants, and specifically not a case in which we have accused UMI, of manufacturing or distributing machines or equipment that can be used by third parties in an infringing way. Therefore, that line of reasoning in Sony is totally inapplicable to the case.

* * *

[35] * * *

What our claim specifically is is that these disks infringe plaintiff's rights, that they have created and are distributing works that infringe plaintiff's rights. And the only way to properly analyze that, we believe, is to actually look at each of the three CD-ROMs that they manufacture to see whether it does infringe plaintiff's rights, to see whether in fact on each of these CD-ROMs there is an infringing reproduction of plaintiff's works.

* * * *

PLAINTIFFS' EXHIBIT — NYTO DISK

[N.B.: This item is not included in the Joint Appendix, but is available to the Court as part of item #52 in the District Court record.]

PLAINTIFFS' EXHIBIT —
GPO DISK/TEXT-ONLY DISK

[N.B.: This item is not included in the Joint Appendix, but is available to the Court as part of item #52 in the District Court record.]

PLAINTIFFS' EXHIBIT —
GPO DISK/IMAGE-BASED DISK

[N.B.: This item is not included in the Joint Appendix, but is available to the Court as part of item #52 in the District Court record.]

EXHIBIT B-1 — DECLARATION OF CHRISTOPHER HUNT, DATED MARCH 14, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF CHRISTOPHER HUNT

CHRISTOPHER HUNT hereby declares as follows:

1. I am Articles Editor of *Sports Illustrated*, a well-known and widely-read weekly magazine published by Time Inc. ("Time"). I have held this position since 1989.

2. My responsibilities include, among others, regularly assigning in-house and freelance writers to prepare and submit articles for publication in *Sports Illustrated*. Accordingly, I have had substantial contact with freelance writers who submit articles to *Sports Illustrated*.

Exhibit B-1

3. Although the manner in which articles written by freelance writers are selected for publication in *Sports Illustrated* can vary, the usual process has been well-established for many years. The decision as to who will work on a particular article is made by the Managing Editor and an editor with responsibility for a particular section of the magazine or a particular subject matter. If they decide that a freelance writer will be used for a particular piece, the editor will contact one or a number of freelance writers to describe the subject matter of the proposed article and to determine the writer's level of interest. Once it is determined that the freelance writer is interested in preparing the article for publication, the assignment is awarded. In addition, *Sports Illustrated* frequently publishes freelance writers' stories the ideas for which were suggested by those writers.

4. At all times relevant to this action, virtually all freelance assignments for *Sports Illustrated* were, and for many years had been, awarded and completed pursuant to a standard written agreement between the freelance writer and *Sports Illustrated*. The standard agreement referred to, among other terms, the topic and length of the article, as well as the date on which it was due and the price to be paid.

5. In some cases, as in the case of plaintiff David S. Whitford's article "Glory Amid Grief," we have engaged in some negotiation over various rights. In Mr. Whitford's case, he did not object to our standard language concerning first publication rights. He did, however, object to our standard language granting *Sports Illustrated* the right to syndicate, or to license, to other publications the right to republish his article, and sought to retain such rights for himself.

Exhibit B-1

Accordingly, we modified our standard contract so that both Mr. Whitford and *Sports Illustrated* could license such republication rights.

6. I am unaware of any instance in which *Sports Illustrated* has agreed, or would agree, to limit the exercise of its right to publish an article solely to the paper edition of the magazine. Certainly, Mr. Whitford never attempted to impose such a limitation. Moreover, such an agreement would be inconsistent with our longstanding practice and policy of making *Sports Illustrated* available in a variety of formats, including paper, microfilm and/or microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 14, 1996

s/ Christopher Hunt
CHRISTOPHER HUNT

EXHIBIT B-2 — DECLARATION OF ROBERT KEANE, DATED MARCH 14, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS, DAVID S. WHITFORD and H. BRUCE FRANKLIN

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE ATLANTIC MONTHLY COMPANY, THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF ROBERT KEANE

Robert Keane hereby declares as follows:

1. I am Assistant Managing Editor of Newsday, Inc. ("Newsday"), which publishes the well-known and widely-read daily newspaper *Newsday*.[1] I have held my current

1. Newsday also published the well-known and widely-read daily newspaper *New York Newsday* between 1984 and 1995. *New York Newsday* ceased publication on July 16, 1995.

position since 1991. Prior to assuming my present position, I held a number of positions at Newsday, including Assistant Managing Editor of *New York Newsday*. I have been employed by Newsday since 1984.

2. While employed by Newsday, my responsibilities have included, among others, regularly overseeing the assignment to writers — including freelance writers with or without contracts and in-house writers — to prepare and submit articles for publication in *Newsday*. Accordingly, for the past five years I have had substantial contact with freelance writers who have submitted articles to *Newsday*; for four-to-five years before that, I worked frequently with freelance writers at another newspaper.

3. The manner in which articles written by freelance writers are selected for publication in *Newsday* has varied over the years. The usual process, however, applicable to most freelance writers, has been well-established for many years, including all times relevant to this action. The decision as to who will work on a particular article is made by an editor with responsibility for the particular section of the newspaper or for the particular subject matter. If an editor decides that a freelance writer will be used for a particular piece, he or she generally will contact one or more freelance writers to describe the proposed article and to determine the writers' level of interest. Once it is determined that a freelance writer is interested in preparing the article for publication, further discussions usually take place. On occasion, a freelance writer will submit an unsolicited article to Newsday for publication in *Newsday*.

Exhibit B-2

4. Most freelance assignments for *Newsday* have been undertaken and completed without any written agreement. The editor and the freelance writer usually discuss the topic and the proposed length of the article, as well as the deadline for the article. There also may be discussions concerning the size of the fee to be paid to the freelance writer.

5. Freelance writers have, on occasion, negotiated and entered into written agreements with Newsday in connection with articles submitted for publication. Freelance writers with written agreements most often are individuals who contribute to *Newsday* on a weekly, bi-weekly or some other regular basis. Certain freelance writers who have regular responsibility for specific topics (*e.g.*, Kathy Wollard, who writes the "How Come?" science column for children, and John Hanc, who writes a running column), also may have written contracts expressly governing their relationship with Newsday.

6. Most freelance assignments for *Newsday* have been undertaken and completed without any written agreement, as I understand was the case with respect to the articles at issue in this action written by plaintiffs Jonathan Tasini, Barbara Garson, Sonia Jaffe Robbins and David S. Whitford. Regardless of whether a written agreement is entered into, Newsday's practice and policy is, and at all times relevant to this action was, to acquire from freelance writers the right to publish all *Newsday* articles in a variety of media.

7. Newsday has, and at all times relevant to this action had, a firm and unambiguous policy of publishing all of its issues in electronic media. Accordingly, since 1989 Newsday

has included a printed endorsement on the backs of all checks paid to freelance writers, including plaintiffs, for their articles. The endorsement reads:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

8. This endorsement expressly confirms Newsday's understanding of the scope of the rights it acquires from freelance writers, including the rights acquired from Tasini for the articles entitled "Striking Miners Dig In for Sit-In at Pittston Plant", "Labor Unions Fine-Tune Battle Strategies", "Proposed Teamsters Election Rules Spark Criticism from Dissidents", "Perestroika for Teamsters?", "Say Adios to American Jobs" and "A Union Boss' Labor Pains"; the rights acquired from Robbins for the article entitled "I Say Legal, They Say Dirty"; the rights acquired from Garson for the articles entitled "Health Care vs. Death Care", "The Common Good Is Swept Aside By the 'Me Generation' ", "In 'JFK' We Feel the Pull of Our Lost Innocence" and "Networks That Serve the Unconnected"; and the rights acquired from Whitford for the article entitled "Baseball, A Business, Is Striking Out".

9. Although Mr. Tasini evidently altered the printed endorsements on the backs of checks paid to him for his articles "Labor Unions Fine-Tune Battle Strategies",

Exhibit B-2

"Perestroika for Teamsters?", "Say Adios to American Jobs" and "A Union Boss' Labor Pains," no one at Newsday became aware of these alterations until long after Tasini had been paid and the articles had been published.

10. For many years, issues of *Newsday* have been reproduced and distributed in variety of formats, and are now available on paper and microfilm and in the LEXIS/NEXIS ("NEXIS") computerized library of periodicals. *Newsday* has been available on paper since 1940.

11. Each daily issue of *Newsday*, going back to approximately the 1970's, is available on microfilm and has been for approximately twenty years.

12. Each daily issue of *Newsday*, going back to approximately 1988, is available in the NEXIS computerized library of periodicals, and has been since approximately 1988.

13. Since approximately 1988, Newsday has provided to NEXIS the full text of all of the articles in each daily issue of *Newsday* by electronically transmitting to NEXIS on a daily basis a complete copy of the same computer text-files the printers use to create that day's paper edition of *Newsday*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that day's issue of the newspaper, as well as headlines, photograph captions and by-lines, and page and section references.

14. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety

Exhibit B-2

the complete, identical textual content of all of the articles that appeared in the paper edition of a particular issue of *Newsday*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 14, 1996

s/ Robert Keane
ROBERT KEANE

EXHIBIT B-3 — DECLARATION OF LANY MCDONALD, DATED MARCH 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF LANY MCDONALD

LANY MCDONALD hereby declares as follows:

1. I am the Director of the Time Inc. ("Time") Library, a position I have held since approximately July 1993. Prior to assuming my present position, I was Deputy Chief Librarian.

2. My responsibilities include, among others, overseeing the process by which *Sports Illustrated* ultimately is

distributed in various formats, such as microfilm and/or microfiche, LEXIS/NEXIS ("NEXIS") and CD-ROM.

3. For many years, issues of *Sports Illustrated* have been reproduced and distributed in a variety of formats, and are now available on paper, microfilm and/or microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals. *Sports Illustrated* has been available on paper since 1954.

4. Each weekly issue of *Sports Illustrated*, going back to approximately August 1954, is available on microfilm and/or microfiche. The creation of these microfilm or microfiche editions began in approximately 1961.

5. Each weekly issue of *Sports Illustrated*, going back to approximately December 1981, is available in the NEXIS computerized library of periodicals. Each issue has been available through NEXIS since approximately 1982.

6. Although I understand the availability of *Sports Illustrated* on CD-ROM is not an issue directly raised by this action, each weekly issue of *Sports Illustrated*, going back to January 11, 1988, is available on UMI CD-ROM products. These products have been available since approximately August 1990.

7. Time provides, and at all times relevant to this action provided, the full text of all of the articles in each weekly edition of *Sports Illustrated* to NEXIS on a weekly basis by delivering to NEXIS a complete copy of the same computer text-files the printers used to create that week's paper edition

Exhibit B-3

of *Sports Illustrated*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that week's edition of the magazine, as well as titles, photograph captions, by-lines and page references.

8. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety the complete, identical textual content of all of the articles that appeared in the paper edition of a particular weekly issue of *Sports Illustrated*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 13, 1996

s/ Lany McDonald
LANY MCDONALD

EXHIBIT B-4 — DECLARATION OF JAMES E. PATTERSON, DATED MARCH 14, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF JAMES E. PATTERSON

JAMES E. PATTERSON hereby declares as follows:

1. I am Vice-President of Information Services for the The New York Times Company ("Times Co."), which publishes the well-known and widely-read daily newspaper *The New York Times* and weekly magazines *The New York Times Magazine* and *The New York Times Book Review*. I have held this position since 1994. Prior to assuming my present position, I held a number of positions at Times Co., including Director of Index Operations, which I held from

1989 through 1993. I have been employed by Times Co. since 1978.

2. As Vice-President of Information Services, my primary responsibility is overseeing the distribution of *The New York Times* in various formats, such as microfilm, microfiche, LEXIS/NEXIS ("NEXIS") and CD-ROM.

3. For many years, issues of *The New York Times* have been reproduced and distributed in a variety of formats, and are now available on paper, microfilm, microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals. *The New York Times* has been available on paper since 1851.

4. Each daily issue of *The New York Times*, going back to approximately 1851, is available on microfilm and/or microfiche. The creation of these microfilm and/or microfiche editions began no later than the 1940's.

5. Each daily issue of *The New York Times*, going back to approximately June 1980, is available in the NEXIS computerized library of periodicals. Each issue has been available through NEXIS since approximately July 1983.

6. Each daily issue of *The New York Times*, going back to approximately January 1981, is available on UMI CD-ROM products. These products have been available since approximately April 1992.

7. Each weekly issue of *The New York Times Magazine* and *The New York Times Book Review*, going back to

approximately January 1988, has been produced in its entirety on UMI CD-ROM products. These products, which graphically depict on a page-by-page basis the entire content of these periodicals (just as microfilm does), have been available since approximately August 1990.

8. Times Co. provides, and at all times relevant to this action provided, the full text of all articles in each daily issue of *The New York Times* to NEXIS on a daily basis by electronically transmitting to NEXIS a complete copy of the same computer text-files the printers use to create that day's paper edition of *The New York Times*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that day's edition of the newspaper, as well as headlines, photograph captions and by-lines, and page and section references.

9. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety the complete, identical textual content of all of the articles that appeared in the paper edition of a particular daily issue of *The New York Times*.

10. Times Co. provides, and at all times relevant to this action provided, the full text of all articles in each daily edition of *The New York Times* to UMI for publication in CD-ROM format. This is accomplished through NEXIS which on a monthly basis provides, and at all times relevant to this action provided, to UMI at Times Co.'s request, a magnetic tape containing a copy of the computer text-files the printers used to create each of the preceding month's daily editions of *The New York Times*, as transmitted to

Exhibit B-4

NEXIS. Thus, UMI receives the content of every article that appeared in the preceding month's daily editions of the newspaper as well as headlines, photograph captions, by-lines, and page and section references.

11. As a result of this process, the complete textual content of each article that has appeared in each daily edition of *The New York Times* during the preceding month has been provided to UMI in the ordinary course of business.

12. Each weekly edition of *The New York Times Book Review* and *The New York Times Magazine* is, and at all times relevant to this action was, made available to UMI for publication in CD-ROM format by providing UMI, on a weekly basis, paper copies of the preceding week's issues of *The New York Times Book Review* and *The New York Times Magazine*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 14, 1996

s/ James E. Patterson
JAMES E. PATTERSON

EXHIBIT B-5 — DECLARATION OF RICHARD PETROSINO, DATED MARCH 14, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS AND DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF RICHARD PETROSINO

Richard Petrosino hereby declares as follows:

1. I am NEXIS Product Manager at LEXIS/NEXIS ("NEXIS"), which owns and operates a computerized library containing a wide range of legal, news-related and periodical publications. Among many other publications, the NEXIS computerized library contains daily issues of approximately 5,800 different newspapers and weekly and monthly issues of various magazines, including *The New York Times*, *Newsday* and *Sports Illustrated*. The NEXIS computerized

library has made research involving those materials enormously more efficient, effective and accessible than reliance on the paper format of the periodicals. NEXIS is used for academic, business and other research purposes, and is available to the public and at, among other places, public and private libraries, schools, universities and businesses throughout the country. NEXIS routinely does not register its computerized library with the Copyright Office.

2. I have held my current position since July 1995. My duties include, among others, overseeing the inclusion of issues of *The New York Times*, *Newsday* and *Sports Illustrated* on NEXIS. Prior to this job, I held a number of other positions with NEXIS, including Manager of Business Information Services Production and Project Leader of a group of production technicians and data control specialists.

3. From approximately July 1983 to the present, each daily issue of *The New York Times* has been placed in the NEXIS computerized library of periodicals.

4. From approximately 1988 to the present, each daily issue of *Newsday* has been placed in NEXIS's computerized library of periodicals.

5. NEXIS assembles, and at all times relevant to this action assembled, its collection of issues of *The New York Times* and *Newsday* by receiving on a daily basis from The New York Times Company ("Times Co.") and Newsday, Inc. ("Newsday"), respectively, an electronic transmission of the complete computer text-files the printers used to create that day's paper editions of *The New York Times* and *Newsday*.

Exhibit B-5

6. After receiving the electronic transmissions from Times Co. and Newsday, NEXIS transfers, and at all times relevant to this action transferred, the content of each day's articles in their entirety, and without substantive revision, to its computerized library. As a result, the textual content of each daily edition of *The New York Times* and *Newsday* in the NEXIS computerized library is, and at all times relevant to this action was, substantively identical to the daily editions printed on paper and the microfilm and microfiche editions of each newspaper. Present, but invisible to any user, are certain codes that have been added for indexing and search purposes so that particular editions, and the information within them, can be located within the computerized library.

7. At the end of this process, the complete, identical textual content of each article that appears in each daily edition of *The New York Times* and *Newsday* appears, and at all times relevant to this action appeared, within 24 hours of the paper edition in the NEXIS computerized library in the ordinary course of business.

8. From approximately 1982 to the present, each weekly issue of *Sports Illustrated* has been available in NEXIS's computerized library.

9. NEXIS assembles, and at all times relevant to this action assembled, its collection of issues of *Sports Illustrated* by receiving from Time Inc. ("Time") on a weekly basis an electronic transmission of the complete computer text-files used by the printers to create that week's edition of *Sports Illustrated*.

Exhibit B-5

10. After receiving the electronic transmission from Time, NEXIS transfers the content of each week's articles in their entirety, and without substantive revision, to its computerized library. As a result, the textual content of each weekly edition of *Sports Illustrated* in the NEXIS computerized library is, and at all times relevant to this action was, substantively identical to the weekly editions printed on paper, and the microfilm, microfiche and CD-ROM editions of the magazine. As is true with *The New York Times* and *Newsday*, present, but invisible to any user, are certain codes that have been added for indexing and search purposes, so that particular issues and the information within them can be located within the computerized library.

11. As a result of these steps, the complete, identical textual content of all of the articles in each daily edition of *The New York Times* and *Newsday*, and each weekly edition of *Sports Illustrated*, is, and at all times relevant to this action was, available to users of the NEXIS computerized library within 24 hours of the publication date of these periodicals.

12. As a result of technical limitations, and in order to reduce expense and maximize load capacity, NEXIS does not include photographs in its computerized library, and it presents each day's articles in a standard full page format, rather than in a columnar format. Each NEXIS library entry does, however, include, with respect to each daily issue of *The New York Times* and *Newsday*, and each weekly issue of *Sports Illustrated*, the page and section references of articles as they appear in the paper editions. This was true at all times relevant to this action.

Exhibit B-5

13. Because the NEXIS computerized library includes the complete, identical textual content of each daily issue of *The New York Times* and *Newsday*, and each weekly issue of *Sports Illustrated*, *The New York Times Book Review* and *The New York Times Magazine* (with additional computer codes that assist research), a person using NEXIS can, and at all times relevant to this action could, search for and retrieve in its entirety the complete text of any particular issue or information contained therein. By including these periodicals in the NEXIS computerized library, the format has simply been shifted from paper to a computer file. In this way, the NEXIS library of periodicals can be used for research purposes just as back paper issues, or microfilm or microfiche copies of periodicals are used.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Dayton, Ohio
March 14, 1996

s/ Richard Petrosino
RICHARD PETROSINO

EXHIBIT B-6 — DECLARATION OF JOHN RIEDEL, DATED MARCH 15, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS AND DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF JOHN RIEDEL

JOHN RIEDEL hereby declares as follows:

1. I am Senior Vice President of Operations of UMI Company, formerly University Microfilms Inc. ("UMI"). UMI produces and distributes, among other products, microfilm, microfiche and CD-ROMs containing daily issues of various newspapers and weekly and monthly issues of various magazines, including *The New York Times*, *The New York Times Magazine* and *The New York Times Book Review*. These products, all used for academic, business and other

research purposes, are made available to, among others, public and private libraries, schools, universities and businesses throughout the country, through the use of UMI's ProQuest work stations. UMI products have made research involving periodicals enormously more efficient, effective and accessible than reliance on the paper format of those materials.

2. I have held my current position since 1995. My duties include, among others, overseeing the process by which UMI includes issues of *The New York Times*, *The New York Times Magazine* and *The New York Times Book Review* on certain CD-ROM products described more fully below. Prior to taking this job, I held a number of other positions with UMI, including Controller, Vice President-Finance, and Senior Vice President-Serial and Research Publishing. I have been employed by UMI for 23 years.

3. From approximately April 1992 to the present, each daily issue of *The New York Times* has been reproduced in its entirety on a UMI CD-ROM product known as "The New York Times OnDisc" ("Times OnDisc"). These daily issues are available on Times OnDisc for all years from 1981 forward. UMI does not register its Times OnDisc products with the Copyright Office.

4. UMI assembles, and at all times relevant to this action assembled, Times OnDisc by receiving from LEXIS/NEXIS ("NEXIS"), on a monthly basis and at The New York Times Company's request, a magnetic tape containing copies of the complete computer text-files the printers used to create each of the preceding month's daily editions of *The New York Times*.

Exhibit B-6

5. After receiving the magnetic tape from NEXIS, UMI transfers the content of the articles in their entirety, and without revision, to CD-ROM discs. The textual content of each day's edition of *The New York Times* that appears on UMI's Times OnDisc products is substantively identical to the paper, microfilm and microfiche editions of the newspaper. Present, but invisible to any user, are certain codes that have been added to the Times OnDisc for indexing and search assistance purposes so that particular editions, and the information within them, can be located on the CD-ROM disc. The final product also includes abstracts of certain of the articles that appear in the daily edition, which are added for research purposes.

6. As a result of technical limitations, and in order to reduce expense and maximize load capacity, UMI does not, and at all times relevant to this action did not, include photographs on its Times OnDisc products, and it presents each day's articles in a standard full page format, rather than in a columnar format. For accuracy and research purposes, each Times OnDisc product also includes, and at all times relevant to this action included, with respect to each daily issue of *The New York Times*, the page and section references of all articles that appear in the paper, microfilm, microfiche and NEXIS editions of the newspaper.

7. Because the Times OnDisc product includes the complete, identical textual content of each day's edition of *The New York Times* plus additional computer codes and some short abstracts to assist research, it is used for research purposes just as back issues of the paper editions, or microfilm or microfiche copies, are used. Thus, a person

using Times OnDisc can, and at all times relevant to this action could, search for and retrieve in its entirety the complete text of any particular daily issue of *The New York Times* or information contained therein.

8. From approximately August 1990 to the present, each weekly issue of *The New York Times Magazine* and *The New York Times Book Review* has been reproduced in its entirety on a UMI CD-ROM product known as "General Periodicals Ondisc". The weekly issues of these periodicals are available for all years from approximately January 1988 forward. UMI does not obtain copyright registrations for its "General Periodicals Ondisc" products.

9. UMI assembles, and at all times relevant to this action assembled, its "General Periodicals Ondisc" by digitally scanning complete copies of each of the preceding week's paper editions of *The New York Times Magazine* and *The New York Times Book Review*. Because these copies are digitally scanned page-by-page, the entire content of each weekly edition of *The New York Times Magazine* and *The New York Times Book Review* that appears on UMI's "General Periodicals Ondisc" is identical — including with respect to photographs and layout — to the paper, microfilm and microfiche editions. Present, but invisible to any user, are certain codes that have been added for indexing and search purposes so that particular editions, and the information within them, can be located on the CD-ROM disc.

10. Accordingly, a person using "General Periodicals Ondisc" can, and at all times relevant to this action could,

search for and retrieve in its entirety the complete textual, photographic and advertising content of a particular weekly issue of *The New York Times Magazine* or *The New York Times Book Review* or information contained therein. By including *The New York Times*, *The New York Times Book Review* and *The New York Times Magazine* on CD-ROM discs, the format of these periodicals has simply been shifted from paper to a computer disc. In this way, UMI CD-ROM products can be used for research purposes, just as back issues of the paper editions, or microfilm or microfiche copies, are used.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Ann Arbor, Michigan
March 15, 1996

s/ John J Riedel
JOHN RIEDEL

EXHIBIT B-7 — DECLARATION OF DENNIS STERN, DATED MARCH 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs,

– vs. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

DECLARATION OF DENNIS STERN

DENNIS STERN hereby declares as follows:

1. I am Associate Managing Editor of *The New York Times*. I have held this position since 1994. Prior to assuming my present position, I held a number of positions at *The New York Times*, including Senior Editor, Deputy Metropolitan Editor and Deputy National Editor. I have been employed by the paper since 1981.

Exhibit B-7

2. *The New York Times* is a well-known and widely-read daily newspaper. In my current position, I am responsible for the general administration of the newsroom at *The New York Times*, including all personnel matters. Moreover, particularly when I served as Deputy Metropolitan and National Editor, my responsibilities have included, among others, assigning in-house and freelance writers to prepare and submit articles for publication in *The New York Times*. Accordingly, I have had substantial contact with freelance writers who submit articles to *The New York Times*.

3. The manner in which articles written by freelance writers are selected for publication in *The New York Times* has varied over the years. The usual process, however, applicable to most freelance writers, has been well-established. The decision as to who will work on a particular article is made by an editor with responsibility for the particular section of the newspaper or for the particular subject matter. If an editor decides that a freelance writer will be used for a particular piece, he or she generally will contact one or more freelance writers to describe the subject matter of the proposed article and to determine the writers' level of interest. Once it is determined that a freelance writer is interested in preparing the article for publication, the assignment is awarded. On occasion, a freelance writer will submit an unsolicited article to *The New York Times* for publication.

4. Historically, most freelance assignments for *The New York Times* have been undertaken and completed without any written agreement, as I understand was the case with respect to the articles at issue in this action written by

plaintiffs Jonathan Tasini, Margot Mifflin and Mary Kay Blakely. The editor and the freelance writer usually discuss the topic and length of the article, the deadline for the article and the fee and any expenses to be paid by *The New York Times*. For many types of articles, there is a well-accepted standard fee, making fee negotiations unnecessary. From time to time, certain writers, particularly in connection with more lengthy, feature pieces, may engage in a short negotiation over the fee. In virtually all instances, there have been no express negotiations over rights. For many years, articles have been accepted based on the practice of distributing each edition of *The New York Times* on paper, microfilm, microfiche, and CD-ROM, and in the NEXIS computerized library of periodicals.

5. In a few cases, usually involving either (a) freelance writers who agree to submit multiple articles over a particular period, such as regular or periodic columnists, or (b) freelance writers of independent stature, *The New York Times* has entered into a written agreement with a writer. I understand that, although some of those agreements expressly refer to "electronic publishing rights," the substance of those agreements always resulted in *The New York Times* obtaining such rights. I am not aware of any instance in which *The New York Times* agreed to a freelance writer's demand that he or she retain such rights.

6. Although the print editions of *The New York Times Book Review* and *The New York Times Magazine* are usually distributed along with each Sunday's edition of *The New York Times* newspaper, each of these weekly periodicals is considered to be an independent publication. For example,

Exhibit B-7

the *Readers' Guide to Periodical Literature* online database includes *The New York Times Magazine* and *The New York Times Book Review* — not *The New York Times* newspaper — as the source of articles that appeared in those publications.

7. One of the articles at issue in this action, "Can It Be Morning In Teamsterland?" by plaintiff Jonathan Tasini ("Tasini"), originally was intended to be a 4,000 word article written for *The New York Times Magazine*, as reflected in an assignment letter from Katherine Bouton to Tasini dated April 18, 1991. This assignment was dropped in June 1991, however, and Tasini subsequently submitted a new, shorter piece entitled "Can It Be Morning In Teamsterland?" which was published on the OpEd page of the December 13, 1991, issue of *The New York Times*.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 13, 1996

s/ Dennis Stern
DENNIS STERN

EXHIBIT C-1 — DEPOSITION TRANSCRIPT OF JONATHAN TASINI, DATED APRIL 10, 1995, pp. 1, 5-6, 23-24, 29, 39, 44, 69-70, 93-96, 109-112, 157-159, 222-226, 237

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

Jonathan B. Tasini
April 10, 1995

* * *

DEPOSITION of JONATHAN B. TASINI, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10002, on the 10th day of April 1995, commencing at 9:10 a.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

* * *

[5] * * *

Q: Well, upon your graduation from UCLA in 1982, what did you do?

A: I basically free-lanced. I want to be accurate, because in between the time I stopped school in Israel and the time I enrolled in UCLA, I did work in other jobs.

Exhibit C-1

Q: But since 1982, have you had any career other than —

A: No.

Q: — as a free-lance writer?

A: No.

Q: You have never worked as a staff writer for any major publication?

A: Not as a staff writer. No.

[6] **Q:** Any publication at all? I didn't mean to exclude any.

Did you ever have a staff position with any publisher?

A: No.

* * *

[23] * * *

Q: And have you ever had any opportunity to use Nexis in connection with your research?

A: No.

Q: You have never used Nexis at all?

A: No.

Q: Do you know how to use Nexis?

A: No.

Q: Have you ever asked anyone to use Nexis for you?

A: No.

Q: Do you know what Nexis is?

A: Yes.

[24] **Q:** Is there a reason why you haven't used Nexis to date?

A: Well, I understand that it's very expensive, that I couldn't afford it. So — and I guess the other reason is, I don't work in an office, because I work at home, so I wouldn't have access to it.

* * *

[29] * * *

Q: How much did you earn as a free-lancer in 1990?

A: I don't recall exactly.

Q: Approximately?

Exhibit C-1

A: Generally speaking, in all the years that I have been a free-lancer, I have made in the twenties.

I really do not recall; in 1990, I might have made less. I certainly did not make more, unfortunately.

* * *

[39] * * *

Q: When did you first learn that the articles at issue in this complaint were available on Nexis?

A: Margaret Bald informed me.

* * *

[44] * * *

Q: Tell me what you can remember about the conversation with Margaret Bald in which you learned that your articles had been included on Nexis.

A: I don't recall the exact conversation. I think basically she said she had found it, and I was surprised, and, you know, it was new information to me.

* * *

[69] * * *

Q: On what do you base the understanding that you had in and about 1990 that what free-lancers were granting as a matter of course to publishers was first North American printed rights?

Exhibit C-1

A: I can only say — I can only speak from my personal experience.

Q: I understand.

A: Well, the best example I can give is, I wrote two articles for The New York Times Magazine prior to 1990.

[70] One was about the Coor's boycott, and the other one was about a basketball player, rookie. And when those appeared, The New York Times syndicate, a person explicitly called me on the phone and said we'd like to buy the right to use that in a printed form in other countries.

And they offered me a sum of money as an advance, and it would be matched against any royalties that were gotten from the sales and then there would be a split of anything that went over $300.

So that was, you know, an example.

* * *

[93] * * *

A: I didn't write that sentence, so I couldn't — I don't know what the writer had in mind in defining that.

[94] Again, once again, I think it's a general statement about our union belief.

Exhibit C-1

Q: So it's your testimony that, in your position as president of the National Writers Union, you cannot tell me what is meant by that sentence in Exhibit 109; correct?

A: I'm saying —

MS. BASS: Objection as to form.

A: You are asking me a very specific question and it is a general sentence. This was written, you know, some time ago and I don't — I did not — I don't recall questioning someone about this particular sentence and I don't know what it referred to.

Q: Mr. Tasini, isn't it a fact that, at its own board meetings, the National Writers Union has referred to what publishers generally obtain from free-lancers as first North American rights?

A: That's probably true. Yes, I would say it's true. I don't recall a specific instance, but it would not surprise me.

Q: And hasn't this lawsuit been brought to establish that first North American rights should not include electronic rights?

[95] (Pause.)

A: No. The lawsuit was brought in order to stop a practice that we feel was violating our rights.

Exhibit C-1

Q: And the practice that was violation your rights is the practice of including free-lance contributions in electronic databases, correct?

A: No. I think I need to be very specific about this. Our knowledge and the practice, I mean, which we worked, was that we only gave print rights. We brought this action because we believed those rights were being violated. As I said before, many of us did not know about the existence of this until we really began looking into it. It was a totally foreign area.

(Pause.)

Q: Mr. Tasini, is it not correct that, according to Exhibit 109, the National Writers Union is seeking to change the existing practice in the publishing industry of including free-lance contributions in electronic databases?

[96] **MS. BASS:** Objection as to form.

A: I think I said this before, that our attempt here, the plaintiffs' attempts — and I assume also the union's overall attempt — is to fight against something that we think was, you know, illegally done, and a practice, that we were not— we were familiar with a practice in the absence of a specific contract that granted any other rights that we had to sign away, that we were giving just first North American rights, which as it says includes only print rights.

Q: But the industry practice is to the contrary, isn't that accurate?

Exhibit C-1

A: The industry may have been taking these rights from people and, I mean, and using the work, but it was not a practice in the sense of agreement or even knowledge on the part of writers.

* * *

[109] * * *

Q: Does the term first, one-time North American print publication rights include or exclude microfilm and microfiche versions of the December 13th, 1991 edition of The New York Times in which Teamsterland appeared?

MS. BASS: Objection. Calls for a legal [110] conclusion.

A: I would say it excludes it, unless I explicitly gave them the right to do it.

Q: That wasn't expressly set forth in writing either, was it?

A: In this particular article?

Q: Yes.

A: No.

Q: When did you first learn that editions of The New York Times were available in microfilm or microfiche?

A: I don't recall.

Exhibit C-1

Q: Was it when you were in high school?

A: Oh. (Pause) I don't recall.

Q: Was it any later than when you were a student at UCLA?

A: Probably not.

Q: And when you sold this article in 1991, then you knew The Times was available across the country in microfilm and microfiche form, didn't you?

A: Yes, probably. Yes.

Q: And when you sold the article in 1991, you had known of other free-lancers whose articles [111] had been included in microfilm and microfiche as part of the original newspaper or magazine in which their works originally appeared, correct?

A: I would assume so.

Q: Do you know if any of those free-lancers had negotiated any additional payments for the microfilm or microfiche uses?

A: No.

Q: Was it by 1991 that you had learned of the issue of your articles and those of other free-lancers being included by publishers in Nexis and in CD-ROM forms as part of the periodicals in which their work first appeared?

Exhibit C-1

MS. BASS: Objection. Asked and answered.

A: I'm just saying that generally in the time frame of '90 or '91 or '92 I began to become aware of the issue.

I didn't understand it, you know, at that time, but it was '91 or '90 or later.

Q: You had no discussions with The New York Times about additional payments for the right to include Teamsterland in microfilm and microfiche, correct?

[112] **A:** For this article, you are speaking?

Q: For Teamsterland.

A: No.

Q: Do you believe that the inclusion of Teamsterland in microfilm or microfiche form is a form of copyright infringement?

A: I believe that if I didn't specifically say it and give people, somebody, the right, that yes.

Q: Prior to filing this lawsuit, did you ever ask The Times to exclude Teamsterland from its December 13th, 1991 edition of The Times on microfilm or microfiche form?

A: No, I did not.

Q: Have you asked since?

A: No.

Exhibit C-1

Q: And you haven't asked since the filing of this lawsuit to have your article excluded from Nexis, have you?

A: No.

Q: Or from any CD-ROM?

A: No.

* * *

[157] * * *

Q: Is it the case that Newsday generally enters into oral agreements with free-lancers for articles similar to those that you submitted?

A: I can only comment on, you know, what my experience has been.

Q: What's your experience?

A: Well, my experience has only been with the op-ed section and the business section of [158] Newsday, so I can't comment on any of the other sections.

They may have other practices.

Q: Did I step on your answer? Were you going to add anything to —

A: I don't think so.

Exhibit C-1

Q: Okay. But your understanding, based on your experience with Newsday, was that it treats these sorts of contributions from free-lancers pursuant to some general oral understanding as to what would be paid; is that correct?

MS. BASS: Objection.

A: I'm just saying it's my own experience. In other words, I haven't had conversations with other free-lancers who have said that.

I am just working from my own experience.

Q: Okay.

A: With Newsday.

Q: But let me see if I understand your experience.

Has your experience been that that is the way that Newsday operates?

A: Oral agreements?

Q: Correct.

[159] **A:** Yes. With my — yes. With my experience.

* * *

Exhibit C-1

[222] * * *

Q: Have you ever attempted to sell a free-lance contribution of yours that appeared in a publication to another publisher?

[223] **A:** Yes.

Q: Successfully?

A: Yes.

Q: About how many times have you done that? (Pause.)

A: Oh, I don't know. I can't put a specific number, but it — let me say sometimes a publisher will come to me and ask for something.

But you're saying me going out and doing it myself?

Q: Well, I will take it either way.

A: It happened both ways. And I think I described one way that it happened previously, particularly with op-ed pieces, was I would syndicate them and I would sell perhaps to one, but I would continue to try to sell to others.

Q: On those occasions, has the second publisher ever asked you whether your article has appeared in another format such as on a computer babe or on CD-ROM?

A: No.

Exhibit C-1

Q: So that has it been the case that any of those articles have appeared in an electronic format?

[224] **A:** Not to my knowledge. I'm not familiar with it.

Q: So we are not talking on these resale occasions about anything that appeared in Newsday or The New York Times; is that correct?

A: Anything or —

Q: Anything.

A: — just the ones in the complaint?

Q: Anything. (Pause.)

A: I don't recall either way.

Q: Is it your view that — are you still thinking?

A: As you were going on, I was trying to keep thinking.

To the best of my knowledge — let me put it this way.

Subject matter that I would have covered in articles in Newsday and New York Times appeared in other places that I sold. You know, I wrote frequently about the Teamster election. I wrote frequently about jobs. And so on. (Pause).

Not that I recall.

Exhibit C-1

Q: In any of these instances when either you [225] approached another publisher or another publisher has approached you, the issue of whether your works have appeared in an electronic database has never come up as a stumbling block to such resale, has it?

MS. BASS: Objection to form.

(Pause).

A: Well, I would say that in the couple of instances where I specifically said to people you can't have this for your — you know, for other than print writes.

But you're saying it didn't prevent a —

Q: Let me make my question clearer.

A: Please.

Q: I am not referring to any efforts that you made to expressly restrict the scope of the grant to the —

A: Okay.

Q: — to the publisher. I am talking about in negotiations over the subsequent purchase of your piece, has the subsequent publisher ever expressed any concern over whether the piece has previously appeared in an electronic format?

Exhibit C-1

[226] **A:** No.

Q: In connection with these resales, have you ever been asked whether these articles have appeared in microfilm or microfiche form?

A: No.

Q: And isn't it the case that that issue has never adversely affected your ability to resell the piece to the second publisher?

A: Not that I'm aware of. I don't know where I might not have gotten a sale because that was the fact.

Q: It's never come up expressly, has it?

A: Not expressly, no.

Q: Do you have reason to think that you've lost certain resales because your article may have appeared in a microfilm or microfiche or a CD-ROM or Nexis format, prior to the occasion when the second publisher was going to purchase it?

A: It could be. I don't have any reason specifically to know that. Nobody said that expressly to me, that we will not buy something because it's already on electronic form.

* * *

Exhibit C-1

[237] **Q:** Did you ever voluntarily and knowingly and expressly grant Newsday the right to include an article of yours on Nexis?

A: No.

Q: Did you ever expressly grant Newsday the right to include an article of yours on a CD-ROM disk?

A: No.

* * * *

EXHIBIT C-2 — DEPOSITION TRANSCRIPT OF MARY KAY BLAKELY, DATED APRIL 17, 1995, pp. 1, 5-8, 13-15, 30-32, 36-38, 43, 70-71, 73-81, 83, 84, 87

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

Mary Kay Blakely
April 17, 1995

* * *

DEPOSITION of MARY KAY BLAKELY, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10002, on the 17th day of April 1995, commencing at 12:25 p.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

* * *

[5] * * *

Q: How long have you been a free-lance writer?

A: Full time since 19 — let's see. Full time free-lancing, since 1977.

* * *

Exhibit C-2

[6] * * *

Q: About how many free-lance contributions have you submitted in your career?

A: I would say that my files contain [7] probably maybe 150 essays, one book that's a collection of humor, and two memoirs.

Q: Would that constitute all the published free-lance work you have done?

A: Yes.

Q: Have you been able to publish most of the free-lance work you have submitted?

A: Yes.

* * *

[8] * * *

Q: Have you had written contracts for all your free-lance work since 1981?

A: For most of it. Not all of it, I guess. I should say that was 1982 when Phyllis Wender became my agent, because it was after I had run a series in The New York Times and that was 1981.

* * *

Exhibit C-2

[13] * * *

Q: You told me earlier that most of the work you have published since 1982 has been under a writer contract.

Is there any reason why some of it would have written contract and some wouldn't?

A: Most of my work has a written contract. I noticed later that The New York Times Book Reviews that I have written did not have an initial contract and the Hers columns.

And otherwise, I can't think of any exceptions where we did not have a contract.

* * *

[14] * * *

Q: Apart from the submissions to The New York Times you've just described, then, all of your work in newspapers and magazines has been pursuant to a written contract?

A: Yes, I believe so.

Q: Did your work for Hers ever get published pursuant to a written contract?

A: Did my work for Hers?

Q: "Hers."

Exhibit C-2

A: You mean in 1981?

Q: Ever, I thought I heard you say that your work for Hers did not have a contract at least initially.

A: That's right. When it was published in The New York Times, but several of my articles that I had written for The Times would then be under contract if the syndicate were interested, so we had syndication contracts with The Times, but for my free-lance articles there were no contracts with [15] The Times.

* * *

[30] * * *

Q: Does first North American serial rights include microfilm rights?

[31] **MS. BASS:** Objection. It calls for a legal conclusion.

Q: Based on your personal experience?

A: Does it include?

Q: Microfilm rights.

A: Microfilm rights? Usually that permission is granted in the contract. When it's not, I assume that the contract is for first North American, unless it's stated in the contract.

Exhibit C-2

Q: In other words, if a contract you sign doesn't expressly discuss microfilm rights, you haven't granted those rights?

A: Right.

Q: Would the same hold true for microfiche rights?

A: Yes.

* * *

[32] * * *

Q: What's your average annual income from your free-lance contributions to newspapers and magazines?

A: Newspapers and magazines. Including reprints and when those articles are anthologized and like how much of my income is generated by the articles produced?

Q: (Indicating affirmatively)

A: I would say from free-lance work probably I've been averaging about 30,000 a year.

Books and film are apart from that.

* * *

[36] * * *

Q: At any point in connection with the articles you sold to The New York Times, did you ever have any discussions

with anyone at The Times about the scope of the rights you had sold in those [37] articles?

A: No, I didn't.

Q: And there's nothing in writing about the scope of the rights you granted The New York Times in those articles, is that right?

A: That's right.

* * *

Q: When's the first time you knew The Times was available on computer databases?

A: Knew for sure, when the suit began and when I talked with Margaret Bald at the National Writers Union.

[38] **Q:** That was in the summer of '93, give or take?

A: Yes. If that's when she began calling everyone, yes.

* * *

[43] **Q:** What's your understanding of Times' policy regarding the placement of your work on microfilm?

A: Well, our history had always been that we sold my work to The New York Times after it was printed in The Times, copyright reverted back to me. If the syndicate served as agent for one of my essays, then a contract was

drawn up between my agent's office and The New York Times sales office for distribution around the country.

Q: I guess I was referring to The Times' practice in connection with the publication of your article before syndication rights were discussed.

Do you know what The Times' practice was regarding that purchase of your articles and the placement of those articles on microfilm?

A: I don't, because of course, again, I didn't have a contract.

What I always assumed that we were selling and because copyright always did revert back to me, I assumed what we were selling was first North American serial rights.

* * *

[71] . . . we're talking about electronic or microfilm rights, we will often say microfiche/microfilm rights for libraries only.

Q: Is that a different grant than electronic publishing rights for storage in libraries only?

MS. BASS: Objection as to form.

A: Yes. I would say that we don't use the phrase electronic publishing, but we will often say in libraries only.

Exhibit C-2

Q: Does that refer to microfilm and microfiche?

A: Yes.

Q: Does it refer to anything else?

A: No. We intend it to mean microfilm, microfiche, and library holdings.

* * *

[74] * * *

Q: Did you agree to write an article for Parents magazine in 1994?

A: That was the excerpt from my book.

Q: All right.

A: That was excerpt from "American Mom". So, that was the note I have here to get you that contract.

Q: Oh, right. Did you grant them first North American serial rights in the book excerpt?

A: Yes. That's what they bought, first North American serial rights, cause that was the only-that was published before the book.

So, yes that's what they bought.

Exhibit C-2

Q: Are you aware of whether Parents magazine [75] believes that that grant allows them to place your article on Nexis?

A: It wouldn't.

* * *

[76] **Q:** So that your sale of first North American serial rights to any of the publishers with whom you have a written contract doesn't allow them the rights to place your articles on Nexis; is that —

A: No.

* * *

[77] * * *

Q: And in 1981, what was your basis for understanding that you had granted first North American serial rights to The Times?

A: Because that's what happened. I mean, I had no reason to think otherwise.

And then when either my agent and I vigorously marketed some of those pieces in other markets, we of course had copyright to do so.

When The Times marketed to other networks, they came back to us for a contract with the syndicate sales office.

* * *

Exhibit C-2

[78] * * *

Q: So when you say that your dealings with The Times in terms of their syndication of your work was consistent with your grant of a first North American serial rights in that work, are you referring to the part of that grant that says first or to the grant in general?

MS. BASS: Objection as to form.

A: Yes, I would say it was the first and [79] only.

My understanding was, the copy would be printed in The Times, and that once it was published in The Times rights immediately reverted back to me; that further sale of those rights could not happen by The Times without negotiation.

Q: Apart from what you've just described, is there any other basis for your understanding in 1981 that what you had sold The Times was first North American serial rights in your work?

A: You mean apart from any other evidence that that was how we were operating?

Q: Yes.

A: Yes. I mean, when the syndicate did sell, after a contract was drafted and the syndicate did sell anything, 50 percent of those proceeds were returned to me, always with a printout indicating which newspapers they had appeared in, where, how many times.

Exhibit C-2

So, there was an accounting system in place. And I had no reason to believe that that had changed.

And that was my evidence.

Q: Okay.

[80] **A:** I mean, periodically we would receive these accounting statements.

* * *

[81] * * *

Q: Have you ever resold articles first published in The New York Times to other publishers?

A: Yes. Some of the early Hers pieces have been anthologized in college textbooks, so we sold those.

The Times bought them to put in the Hers anthology, so we sold them back to The Times for second serials in the Hers collection.

I can't remember which specific articles, but we also had a lot of interest in the feminist issues overseas in some of the foreign publications, so some of those articles may have been sold on the continent.

Q: When those articles were resold, were you ever asked whether any of the articles appeared in another format, like Nexis?

Exhibit C-2

A: No. We were only asked who owned the copyright.

Q: Have you ever been asked in the course of reselling an article whether it appears on microfilm?

A: Not that I recall.

* * *

[83] * * *

Q: Has anyone ever pulled an article from Nexis on your behalf?

[84] **A:** Not at my request.

* * *

[87] * * *

Q: Do you belong to any on-line services?

A: I don't.

Q: Compuserve, for example?

A: I don't.

* * * *

EXHIBIT C-3 — DEPOSITION TRANSCRIPT OF BARBARA GARSON, DATED APRIL 12, 1995, pp. 1, 6-8, 28-29, 51-52, 64-65, 74-75, 82-83, 95-98, 121-123, 125

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

Barbara Garson
April 12, 1995

* * *

DEPOSITION of BARBARA GARSON, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10002, on the 12th day of April 1995, commencing at 1:00 p.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

* * *

[6] * * *

Q: How long have you been a free-lance writer?

A: Since the first play I wrote in 1965.

* * *

Q: About how many free-lance contributions have you submitted in your career?

Exhibit C-3

A: I don't know. I've made my entire living on it. I've written about — when I write a bio, I would list five or six plays, three books, and then I would say "and articles in," and list a lot of papers.

At one time I knew that those articles were over 100, but that was maybe 15 years ago. I [7] had to count them up for a grant.

* * *

Q: In a year where you would be focusing on your free-lance work, how many articles do you think you would submit for publication?

A: In the years — it happened that the years that I was writing for the articles that are the subject of this suit, I probably published 10 or 12 short articles, but they were published in many different places.

Q: Meaning that after they were first published in one newspaper or magazine, you then resold the same article for publication somewhere else; is that right?

A: Yes. Because it's standard practice to — everybody knows that they are just getting [8] one-time use. So I send them out to other places.

* * *

Exhibit C-3

[28] * * *

Q: Tell me how long you've been a free-lance writer again.

It's been more than 20 years, is that right?

A: Yes, it has been more than 20 years, but it hasn't always been newspaper work.

Q: I understand. That was including your plays and other work?

A: Right.

Q: And during that time it sounds like you have made extensive connections through the publishing industry, both at newspapers and magazines, is that right?

A: Oh, I only started the self-syndicating, I don't know — when did — about the same time as the relevant articles for this suit.

[29] **Q:** Meaning the early nineties?

A: Yes, '89. Right. It's when fax machines became available, so I could fax them to other people.

* * *

Exhibit C-3

[51] * * *

Q: What's your average annual income from free-lance contributions to the publications you identified in your answers 3 and 4 to the interrogatories we sent you?

A: Oh, low. The average varies quite a lot.

When I am doing this free-lance writing, I could make seven or $8,000, and then I have a [52] book contract, and then I'll make a little more.

Q: Is seven or eight at the low or high end of the range if there is an average range?

A: It's low. This newspaper writing isn't a very big deal.

Q: Is there an upper end of a range of average free-lance —

A: It is so unpredictable. You just have to ask me about years.

Q: In 1994, what was the —

A: 1994 was a great year. Oh, no, no, no, I'm sorry, it didn't happen in '94.

Yes, it did. I got $30,000 advance on a book and put that money in the bank, along with the maybe six or seven that I made on the — but I would have to go to my taxes to

see, but I probably made about $35,000, and that was a big year as a free-lance writer.

Q: But excluding the book contract, something about six or $7,000?

A: Exactly.

* * *

[64] * * *

Q: How did you learn that these four Newsday articles appeared on the Nexis database?

A: Someone called me from the National Writers Union and asked did I know that my material was on Nexis, and I said no, I didn't know.

Q: Do you remember when you got that call?

A: Sometime before this — obviously, sometime before this suit was filed.

Q: Was it sometime in 1993?

A: You know, really, I — you know, if it were '92 I wouldn't know, you know. I'm really bad on these dates.

Q: Do you remember who called you from the NWU?

Exhibit C-3

A: It was a woman. And I'm sorry not to remember, no.

Q: Would it have been Margaret Bald?

A: Well, it surely could have been. I mean, I feel bad that I don't remember people, everybody, the people who work so hard at the union's names.

Q: Have you ever used Nexis?

A: No.

Q: Have you ever used any computer database [65] like Nexis, as you understand Nexis to be?

A: No. I've looked at friends using the Internet.

Q: Have you ever used a CD-ROM that contains the contents of newspapers or magazines?

A: No.

* * *

[74] * * *

Q: Does Newsday appear on microfilm?

A: I don't know.

Exhibit C-3

Q: Did you grant Newsday the right to put your article in a microfilm edition of Newsday when you granted them one-time rights?

A: No, I never thought about it. I didn't say yes or no.

The question never entered my mind and no one ever asked me.

Q: Is that because you don't know whether Newsday appears in microfilm?

A: It's because I never thought of it at the time. Since you mention it, I'll ask next time.

If they'd asked me, I'd say yes. If they had asked me then, assuming that a microfilm is something that you use, as you were bringing up before, at a library, I would say yes.

[75] **Q**: Would you say yes to microfilm because it is a library-based product?

A: I guess because I hadn't thought of anything else to do with it on microfilm myself.

I don't know. Yes, it sounds like a kindly, noncommercial dealing.

I don't know. Nobody ever asked me and I never thought about it at the time.

* * *

Exhibit C-3

[82] * * *

Q: I wanted to go back to something you told me earlier, which is that as a matter of course you grant one-time rights in the work you sell to publishers as a free-lance writer.

A: To newspapers.

Q: To newspapers. Is that correct?

A: Yes.

Q: Is there anything in your grant of one-time rights in articles you sell to newspapers that restrict the newspapers choice of a medium in which they publish your work?

(Pause.)

A: Are you trying to say to me when I sell the newspaper one-time rights, could he make a movie out of it?

[83] Absolutely not.

Q: Do you —

A: I assume that means one-time printing in the newspaper which I know him to be the publisher of.

* * *

Exhibit C-3

[95] * * *

Q: If I told you that Newsday now keeps an electronic morgue of its back issues, would you think that Newsday has the right to place the articles you've complained about in its electronic morgue?

A: Well, I never thought about that before.

MS. BASS: Objection.

Q: What's your opinion?

[96] **A:** Would I think they have a right?

Q: Yes.

A: If they asked me, I certainly would give them permission like that (indicating), to keep them in any form in the back room.

Q: What if they hadn't asked you?

A: Then I don't know if they have the right. Why don't you ask me?

Go ahead. Ask me for permission if you represent them.

Q: I am just asking if you think they have the right or not, if they haven't asked you ahead of time.

Exhibit C-3

A: I haven't really thought about it, how they store their material.

Q: Sitting here today and just thinking about it, do you have an opinion one way or the other?

MS. BASS: Objection as to form.

(Pause.)

Q: I'm sorry?

A: You want to ask the question again?

(Question read.)

A: I don't know what to make of a question [97] like that.

Before this all started, I wouldn't have run around looking to see how they stored things and be ready to say, gosh, you can't store my things this way or that way.

I simply would never have thought about it.

Q: But now that this whole thing has started, have you changed your thoughts about that?

A: If anybody else, if any of the nice people that I knew at Newsday, said you think we can keep these things in the back room? I might try to answer the question.

Exhibit C-3

But since yours seems to revert to larger issues than that, I, I can answer you.

Q: Let me try to keep the question less large.

A: Okay.

Q: Given that no one at Newsday has asked your permission to place your work in their electronic morgue, of you think they have the right to do or don't they?

MS. BASS: Objection. Calls for a legal conclusion.

[98] **Q:** Based on your own personal experience as a free-lance writer?

A: I don't know if they have the right. If they don't have the right and they want to ask me, I would certainly give them the permission.

Q: Okay.

A: I think I'd go further than that. If they don't have the right to keep it in their morgue and they did it anyway I'll let them off the hook.

(Pause.)

Q: I trust your answer wouldn't be the same if you were aware Newsday put articles on a different sort of electronic database?

Exhibit C-3

A: No, it wouldn't.

Q: What would the difference be?

A: They're using my article profitably in some way that I never gave them permission to.

* * *

[121] * * *

A: You are asking the same question you asked before.

Q: Right, but now we've had an opportunity to look at language that you say accurately reflects the scope of the rights you sold to Newsday in your articles.

And I'm asking you whether this scope of [122] rights includes or excludes microfilm editions of Newsday?

MS. BASS: Calls for a legal conclusion.

* * *

Q: Does it include or exclude the right to put your articles on a computer database edition of Newsday?

MS. BASS: Calls for a legal conclusion.

* * *

Exhibit C-3

MS. BASS: Lisa, can I make a suggestion?

I don't want to keep on continuing to object, and it seems to me that if what you're really asking her is whether she intended to sell [123] electronic rights —

THE WITNESS: The answer is no.

MS. BASS: — then ask that question.

* * *

A: Did I intend to sell them anything other than those two editions that I knew about? No.

* * *

[125] **Q:** Has any publisher to whom you're reselling an article ever asked whether that article appears in a computer database?

A: No.

Q: Have they ever asked —

A: Nor has any publisher who I ever sent it to just faxed ever been confused and put it on a database as far as I know.

They all seemed to know what one-time use was and what I was sending them.

Exhibit C-3

Q: Has any publisher to whom you were attempting to resell an article ever asked if that article appeared in a CD-ROM format?

A: No.

* * * *

EXHIBIT C-4 — DEPOSITION TRANSCRIPT OF MARGOT MIFFLIN, DATED APRIL 11, 1995, pp. 1, 5-8, 11-12, 14-15, 22-23, 26-30, 49-52, 54-55, 70, 89-92, 94-97, 100

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

Margot Mifflin
April 11, 1995

* * *

DEPOSITION of MARGOT MIFFLIN, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10002, on the 11th day of April 1995, commencing at 12:55 p.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

* * *

[5] * * *

Q: What have you done since 1986?

A: From '86 to '88, I wrote and waitressed. And since '88, I've written exclusively.

* * *

Exhibit C-4

Q: Have you taught journalism at all?

A: Yes.

Q: Are you doing so now?

A: No.

Q: When did you teach journalism?

[6] **A:** I taught at NYU from — in the fall and spring of '93 and '4 as an adjunct.

Q: Was that one full academic year?

A: Yes.

Q: Fall of '93 to spring of '94?

A: Yes, although I wasn't a full-time teacher.

Q: Since 1990, can you give me an average annual income that you have been able to achieve as a result of your free-lance writing activities?

A: Average is probably 25,000.

Q: Has that been approximately consistent over that period?

A: Within a few thousand dollars.

* * *

Exhibit C-4

[7] * * *

Q: How many contributions over the last three years have you submitted to Mirabella?

A: Mirabella, I've only written for in the [8] past year. I've written four articles.

Q: And what about Swing?

A: Swing, I believe three articles in the past year.

* * *

[11] * * *

Q: Can you explain the circumstances under which you deleted from the Swing contributor's agreement the language "in all mediums, including electronic publication"?

A: I received the contract. I called my editor and told him, and her, that I objected to the electronic rights clause, and asked if I could scratch it.

And my editor approved that.

Q: What happened in the case of the Mirabella agreement?

A: Exactly the same thing.

Q: Do you know whether Swing is included in any electronic database?

Exhibit C-4

A: I don't, but I doubt it.

Q: Why do you doubt it?

A: They are a new publication.

Q: Do you know whether Mirabella is included in any electronic publication?

A: No.

Q: Do you have a doubt or a view one way or the other?

[12] **A:** No.

* * *

[14] * * *

Q: Is that news to you?

A: That publishers would be including print articles in electronic databases?

Q: Yes.

A: It's not news now.

Q: When did you first become aware that that's what publishers did?

A: In about the summer —

Exhibit C-4

MS. BASS: Objection.

I'm sorry.

A: About the summer of '93.

Q: What did you learn in the summer of '93?

A: That my articles were on — were being sold, essentially, to Nexis.

Q: What articles did you learn were being sold to Nexis?

A: My New York Times articles.

Q: Did you learn about any other articles?

A: Not on Nexis.

Q: What other articles did you learn about [15] on some other database?

A: I saw my articles on Proquest, a database.

Q: What articles?

A: Actually, New York Times articles, and Art News articles.

* * *

Exhibit C-4

[22] * * *

Q: Is it your understanding that first North American rights, which is a term that you have seen used, does not include anything other than print publication rights?

A: Yes, it's my understanding.

Q: Do you know whether the publishing industry agrees with that?

A: Well, I know, for example that the Writer's Market, which is a standard industry tool for free-lancers, states that if you have a verbal [23] agreement for an article, you're selling only first American rights, and that any other rights, according to the 1978 Copyright Act, must be put in writing and signed by both parties.

* * *

[26] * * *

Q: Do you know that your articles in The New York Times, including the ones identified in the complaint, are included in microfilm and microfiche, copies of The New York Times?

A: I'm sure they are.

Q: Do you regard that as an infringement of your copyrights?

Exhibit C-4

A: It really depends on whether those rights were sold by The Times to the people who carry microfilm and microfiche.

Q: Well, what if they are sold by The Times, whatever you mean by that? What is your answer?

A: Can you repeat the question?

MR. KELLER: Can you read it back.

(Record read.)

A: I can't say, because I said my answer depends on whether they are sold or not. So I don't have an answer.

Q: I asked you to assume for the purpose of answering the question that they are sold.

A: If they are sold, yes, I do feel it's an infringement.

Q: And if they are not sold?

[27] **A**: I'd have to think about that one.

Q: Why? What's the difference? What distinction are you drawing in your mind?

A: Well, that they're profiting from something I sold them without my permission, whereas, for example, if they are simply given to libraries where they are not used for profit, that doesn't bother me.

Exhibit C-4

Q: Is it your view that The New York Times is given away to libraries across the country?

A: I don't know. I don't know what the policy is.

Q: You don't know the policy as to whether a library that wants to retain print editions of The New York Times needs to subscribe to it?

A: I assume they subscribe.

Q: Do you have a view based on that assumption as to whether a library that wants a microfilm or microfiche edition of The New York Times needs to pay for it?

A: I assume they probably pay for it.

Q: Whether the New York Times sells it to them directly or does so through another source, correct?

[28] **A**: Yes, I would assume.

Q: Then I'm confused by your answer to a couple of questions ago.

If in either case — I thought you were drawing a distinction as to whether the microfilm editions were given to a library for free by The New York Times.

I think it's fairly safe to say that it does not happen often, if at all. Will you agree with me?

A: That they're given? It doesn't happen often that they're given?

Q: Correct. Normally the situation is that a library must pay for a microfilm or microfiche edition of the times, just as it must pay for a printed edition of the times?

A: Yes.

Q: Do you agree with that?

A: Yes.

Q: Then I do not understand the distinction you are trying to draw.

A: Well, I don't understand the analogy between electronic rights and microfilm and [29] microfiche, because microfilm and microfiche have a very limited application in a library context, whereas electronic rights have unlimited possibilities in the future for use commercially.

Q: So, your distinction is drawn over the possibility of commercial exploitation of the medium as opposed to anything based in the copyright act?

A: Commercial exploitation and permissions. My objection is that my work is used without my permission.

Q: Did you ever give a publisher permission to use your work on microfilm or microfiche?

A: I did not.

Exhibit C-4

Q: Have you ever objected to a publisher including one of your works in microfilm or microfile?

A: I haven't.

Q: Do you intend to?

A: I don't know.

Q: Have you discussed the question with anyone?

[30] **A**: Yes.

Q: With whom have you discussed it?

A: With Emily.

Q: Don't tell me the substance of any conversation you have discussed with counsel.

A: Okay.

Q: Other than Emily, can you answer the question and tell me what discussions you've had?

A: I don't really remember discussing it with anyone else.

Q: When's the first time you researched anything on microfilm and microfiche?

A: Probably in the early eighties.

Exhibit C-4

Q: Did your research include at that time any major periodicals?

A: I'm sure I did.

Q: Did it include The New York Times?

A: Probably.

Q: Was there any doubt in your mind when you sold your articles to The New York Times that they would be included in microfilm and microfiche?

A: I didn't think about it.

Q: You assumed that it would?

A: I honestly didn't think about it.

* * *

[49] * * *

A: I remember conversations with writers about the inconsistency of the industry.

Q: What inconsistency are you referring to?

A: That it was difficult to know what to expect from magazines because contracts varied so much and the language varied.

Q: Did the language regarding first North American rights vary?

Exhibit C-4

A: No.

Q: That language was asked?

A: Pretty much. Most magazines at that time, prior to about '93, asked for first North American rights.

Q: Did you ever hear the expression "first North American serial rights"?

A: Yes.

Q: Did you ever hear the expression "first North American magazine rights"?

A: Not so much. Not magazine rights.

Q: Are you saying — you said not so much. Does that mean you've heard it some but not so [50] often?

A: Not as often as North American serial rights.

Q: But you did hear it?

A: Actually, I can't say I remember hearing magazine rights.

Q: Do you have an understanding today as to whether the term "first North American serial rights" and the term "first North American magazine rights" are equivalent?

A: I would assume they're equivalent.

Exhibit C-4

Q: Do you have an understanding as to whether they include or exclude microfilm or microfiche?

A: I don't.

Q: Do you have an understanding as to use whether they include or exclude any form of electronic rights?

A: I assume they exclude them.

Q: Why do you so assume?

A: Well, for one thing, because that phrase was used before electronic rights existed, so how could first North American rights suddenly absorb electronic rights?

[51] * * *

Q: What is it in the expression "North American magazine rights" or "North American serial rights" that in your view excludes electronic rights?

Let me ask it a different way. What is it in that phrase, either of those phrases, that limits the distribution medium of either the magazine or the serial, which I take it is synonymous with magazine?

[52] You understand that?

A: Yes. Meaning periodical rights?

Q: Yes. What is it in that phrase that limits the distribution medium of the magazine to print?

Exhibit C-4

A: Well, that's a semantic question. It's a phrase that was long used to mean one thing. And it seems impossible that electronic rights, as a new concept, could suddenly be included in that phrase, when it had been practiced for years without that inclusion, or enforced for years without that inclusion.

* * *

[54] * * *

Q: Did you make the notation "one-time rights" on this invoice?

A: Yes.

Q: And what is that supposed to mean?

A: That means the magazine is free to publish the article once.

It doesn't guarantee that the magazine will be the first magazine to publish the article.

Q: Does it mean anything else?

A: It does not include electronic rights.

[55] **Q:** You're certain of that?

A: As I understand one-time rights.

Exhibit C-4

Q: On what do you base your understanding of one-time rights?

A: Standard industry practice and the Writer's Market which lists rights and defines them.

Q: Do you know whether this article is available on Nexis?

A: I don't know.

Q: Have you looked?

A: I haven't.

Q: And if it was available on Nexis, would you believe that your copyrights were being violated?

A: I would.

* * *

[70] * * *

Is it your testimony that it is universally accepted by publishers in the publishing industry that North American publication rights are rights exclusively limited to the print medium?

A: It's my understanding that that's — yes, that that's what editors presume when they use this in contracts.

Exhibit C-4

Q: And that microfilm and microfiche are excluded?

A: I don't have — I have no idea about how microfilm and microfiche relate to this.

Q: How is it that you are uncertain as to how microfilm and microfiche relate to this, but you are certain as to how CD-ROM versions of The New York Times relate to this?

A: Because CD-ROM and electronic usage are new technologies that are very broad and whose frontiers are yet undiscovered.

And that's something for me to be concerned about.

[89] * * *

Q: I apologize again if I have asked you this question previously, but we are close to finishing up and I want to make certain that I have covered a couple of issues.

So let me ask you whether, at the time you sold your first article to The New York Times in January of 1991, whether you knew The New York [90] Times was available across the country in microfilm and microfiche format?

A: When you say my first article —

Q: First article listed in paragraph 74 of the complaint.

A: Oh, okay. I wasn't aware.

Q: You did not know in 1991 that The New York Times was available in microfiche and microfilm, correct?

Exhibit C-4

A: Oh, oh, I'm sorry. I thought you were talking about electronic rights.

Q: No, I was talking about microfilm and microfiche.

A: I did know it was available in those forms.

Q: And is it your view that you sold The New York Times in connection with your article published on January 20th, 1991, microfilm and microfiche rights?

A: I didn't think about those rights. I thought only about print rights.

Q: Are you saying you have no view on the matter?

[91] **A:** On the matter of microfilm and microfiche?

Q: As to whether your article that you sold in 1991 to The New York Times conveyed to The New York Times the right to reproduce your article in microfilm and microfiche.

A: I didn't —

MS. BASS: Objection. I think it calls for a legal conclusion.

Q: I am asking if you know what you sold to The New York Times.

Do you know?

A: I know I sold them print rights. I don't know whether I sold them microfilm and microfiche rights.

Exhibit C-4

Q: Have you ever asked The New York Times to exclude your article from any of its microfilm or microfiche editions?

A: No.

Q: Have you ever asked it to exclude anything that you had written for them from any Nexis edition of the newspaper?

A: No.

Q: Have you ever asked them to do so in [92] connection with any CD-ROM version of the newspaper?

A: No.

Q: Why not?

A: Because my goal isn't to be excluded from those things.

My goal is to be asked permission if my work is going to be sold to such services.

* * *

[94] **Q:** Is this lawsuit costing you any money?

A: No.

Q: Who's paying for it?

Exhibit C-4

A: The National Writers Union.

Q: Where are they getting the money from?

A: The National Writers Union.

Q: All from union contributions, union member contributions?

A: I'm not sure about the breakdown. I'm sure, since we're affiliated with the UAW, there's support there.

Q: If this lawsuit did cost you any money, if you were liable, personally liable for any portion of funding it, would you participate in it?

A: I can't say that.

* * *

[95] * * *

Q: Have you ever attempted to sell any of your free-lance contributions to a second publisher after their original publication in —

A: Yes.

Q: — a first publisher's periodical?

A: Yes.

Exhibit C-4

Q: Have you ever done so in connection with any of the articles set forth in paragraph 74?

A: I don't believe so, no.

Q: For what articles have you attempted such resales?

[96] **A:** Well, the Success article in Exhibit DX 132.

Q: Yes?

A: That appeared both in Mirabella and in Success Magazine in varied form.

Q: To whom did you sell it first?

(Pause.)

A: It's hard to remember.

Q: Well —

A: I think it was Success who was first.

Q: So the resale was in connection with Mirabella?

A: Yes.

Q: When Mirabella agreed to purchase that article, did they know it had previously appeared in Success in some form?

Exhibit C-4

A: Yes. I got both assignments within the same week or two, and I told both editors about each other, and each editor said that's okay.

Q: We think it is Mirabella that was second.

Did Mirabella also ask, in addition to any question that they asked about Success, whether your article also would appear in any electronic [97] form?

A: No, they didn't.

Q: By virtue of its first publication?

A: No.

Q: So that was in no way any impediment or detriment to your possibility of selling that article to Mirabella, correct?

A: That —

Q: That possibility never came up?

A: No.

* * *

[100] * * *

Q: Is 1992 the first time you used Nexis?

A: Yes.

Exhibit C-4

Q: Do you know when in 1992 you used Nexis?

A: I don't. I'm not even certain it's '92 but it was around the time that the library first got Nexis.

Q: You never used it in college?

A: No.

Q: You never used it as a graduate student at Columbia?

A: No.

Q: NYU? Excuse me.

A: NYU. No. And subsequent to that, it was difficult to get access to. It's expensive and the library has limited usage times.

* * * *

EXHIBIT C-5 — DEPOSITION TRANSCRIPT OF SONIA JAFFE ROBBINS, DATED APRIL 11, 1995, pp. 1, 8-9, 18-19, 27, 33, 50-53, 55-58, 63, 74

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

Sonia J. Robbins
April 11, 1995

* * *

[1] . . . Deposition of SONIA JAFFE ROBBINS, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10022, on the 11th day of April 1995, commencing at 3:30 p.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

[8] * * *

Q: What did you do between 1969 and 1987?

A: Oh, dear. I should have brought my resume.

Actually, maybe I should have. When I finished my degree at City College, I got a job as a secretary, and then I became an assistant editor at Bobbs-Merrill, book publisher. I worked there for two and a half years. [9] Then I had a

daughter, and I was home and freelance editing and copy editing for about two years. Two and a half maybe, it may have been three years.

Then I started working part time at The Village Voice as a copy editor.

And I worked part time for about a year, full time for another two or three years.

Then I became the copy chief in 1979. I was copy chief and then became deputy managing editor until 1986, when I left to take a teaching job at New York University in the journalism department.

Q: Do you still hold a teaching job at the NYU journalism department?

A: I'm teaching, but part time, not full time.

* * *

[18] * * *

Q: Do you have a Nexis ID number

A: No.

Q: Does the department of journalism have a Nexis ID number?

[19] **A:** That's a good question. I have no idea.

Exhibit C-5

Q: But you have access to a Nexis ID number in order to access the Nexis service?

A: I probably do, but I've not, I've not used it.

Q: You've never used the Nexis service through your work at NYU?

A: I never have.

Q: Have you ever used the Nexis service for any reason at all?

A: I've never used it myself, no.

Q: Has anyone ever used it on —

A: Actually, I tried to use it once and I was very unsuccessful, so I left it alone.

Q: Do you remember when that was?

(Pause.)

A: I think it was sometime this semester.

Q: Why were you unsuccessful in your use of Nexis?

A: Probably because I was phrasing my search queries in the wrong way, but I wasn't finding anything that seemed useful.

* * *

Exhibit C-5

[27] * * *

Q: How long have you been a freelance writer?

A: I guess seven years.

* * *

[33] * * *

Q: Did you ever enter into any written agreements with any of the publishers who published your freelance work at all?

A: No, I never did.

* * *

[50] * * *

Q: The complaint goes on to allege in paragraphs beginning at paragraph 421 through about 429 that the article appears on the Nexis [51] database.

Is that allegation correct?

A: I have been told that it's correct. I don't know from my own personal knowledge.

Q: How did you learn that your article appears on Nexis?

A: Someone from the Writers Union called to tell me

that.

Q: When did that person call to tell you?

A: I don't recall exactly. It was — I think it was in the summertime, and I think it was two or three years ago.

No, I guess — no. I think it was two years ago.

Q: By two years ago, do you mean 1993?

A: I think so. Maybe it was three years ago.

As I say, I don't remember exactly.

* * *

[52] * * *

Q: Before you received that phone call, did you have any knowledge that that particular article appeared on Nexis?

A: No.

* * *

[53] **Q:** Have you ever used a CD-ROM to retrieve articles from a newspaper or magazine?

A: No.

* * *

Exhibit C-5

[55] * * *

Q: Did you ever talk with anyone in Newsday about the rights you were granting them in that article?

A: No.

Q: You never had any express discussions with anyone at Newsday before the article was published about rights?

A: No.

Q: Do you remember talking about the article at all with anyone at Newsday before it was published?

A: Just with the editor about — and when I queried her about whether she would be interested in the article.

Q: What was the name of the editor?

A: Annette Fuentes.

Q: What was the substance of your [56] conversation with her when you called assuming you did call to pitch the article?

A: I actually sent her a letter describing the article and she called me back saying that she was interested.

Q: What else did you talk about with Ms. Fuentes during that call?

Exhibit C-5

A: I think we probably talked about length, and I'm sure that we talked about money and due date.

* * *

[57] * * *

Q: Did the topic of the rights you were granting or any limitations on the rights you were granting come up in either of the two conversations you've just described?

A: No. Did not.

Q: Did you have any subsequent conversations with Ms. Fuentes, after the two that you've just described?

A: No.

[58] **Q:** After the two — sometime after the two conversations the article was published in Newsday, is that right?

A: Yes.

Q: After the article was published, did you ever have occasion to talk to anyone at Newsday about the article?

A: No.

Q: Did you receive a check in the mail for the article?

A: I did.

Exhibit C-5

Q: You said, I think, that you supposed the grant of rights you made to Newsday in "I Say Legal" was implicit.

A: Yes.

Q: Did you grant them the right to put the article on microfilm?

A: No.

Q: Do you know if it's on microfilm today?

A: I don't know.

Q: If it is on microfilm is that a violation of your rights under the copyright act?

A: I don't know.

* * *

[63] * * *

Q: When you sold "I Say Legal" to Newsday in 1991, did you know whether or not Newsday was available on Nexis?

A: I did not know.

* * *

Exhibit C-5

[74] * * *

Q: How did you come to be involved in this lawsuit?

A: Well, somebody from the Writers Union told me that, subsequent to my being told that my article was on Nexis, that the Writers Union was considering — that people were — members of the Writers Union were considering a lawsuit, and did I want to be a party to the suit.

And I said yes.

Q: Do you know why you were selected for a phone call soliciting your involvement in the lawsuit?

MS. BASS: Objection as to form.

A: Do I know why I was selected?

No, I don't.

* * * *

EXHIBIT C-6 — DEPOSITION TRANSCRIPT OF DAVID WHITFORD, DATED APRIL 10, 1995, pp. 1, 4-9, 12, 48-49, 59, 63, 66-67, 79-82

In The Matter Of:

Jonathan Tasini, et al

v.

New York Times Co., et al

David S. Whitford
April 10, 1995

* * *

DEPOSITION of DAVID S. WHITFORD, held at the offices of Debevoise & Plimpton, Esqs., 875 Third Avenue, New York, New York 10002, on the 10th day of April 1995, commencing at 3:45 p.m., before Morene Korenman-Bangel, a Shorthand Reporter and Notary Public of the State of New York, pursuant to Notice.

* * *

[4] * * *

A: I obtained my undergraduate degree at Brown University, and a graduate degree in journalism at Columbia. Master's degree.

* * *

Exhibit C-6

[5] * * *

A: In early 1994 I was a part-time free-lance journalist.

* * *

[6] * * *

Q: What did you do since 1982, when you received your masters, and 1986?

A: I worked at Sport Magazine.

Q: Full time?

A: Yes.

Q: What was your position at Sport Magazine?

A: I started as research editor, and I was associate editor at the end.

Q: What were your duties as research editor?

A: Fact-checking.

Q: And associate editor?

A: Writing and editing.

Q: Did you assign any writers stories while you were at Sport Magazine?

Exhibit C-6

[7] **A:** Yes, I did.

Q: Did you assign any free-lance writers stories while you were at Sport Magazine?

A: Yes, I did.

Q: Did Sport Magazine have a written agreement pursuant to which it assigned free-lance writers assignments?

A: To the best of my recollection, no.

Q: Those free-lance assignments, to the best of your recollection, were oral assignments?

A: Yes.

Q: And that was 1982 to 1986, correct?

A: Yes.

Q: For what years were you associate editor in that period?

A: To the best of my recollection, the final two years.

Q: Is it fair to say that Sport's practice at that time of assigning free-lancers assignments orally as opposed to in writing was representative of the magazine industry practice generally in the years 1984 to 1986?

A: I don't know enough to answer that question.

Exhibit C-6

[8] **Q:** Do you know enough today to know whether it is the practice of the publishing industry generally to assign free-lance writers assignments orally as opposed to in writing?

A: Today I would say that would be contrary to standard practice.

Q: Was there a period from 1986 to today when that was standard practice, as best you know?

A: When what was standard practice?

Q: Assigning free-lancers assignments orally as opposed to in writing.

A: Between 1986 and today?

Q: Correct. Today you say it would be contrary to current practice.

I want to know whether there was a period in between when it was representative of current practice.

A: I don't know when the change took place.

Q: You understand that there was a change at some point?

A: I understand that, to the best of my recollection, in the early eighties when I was at Sport Magazine, our practice was to assign stories orally.

Exhibit C-6

[9] And I understand that today, to the best of my knowledge, that's no longer standard practice in the magazine industry.

* * *

[12] * * *

Q: Excluding your books, can you tell me approximately what your average annual income from your free-lance contributions were?

A: Excluding the books. (Pause). Five or $6,000.

* * *

[48] * * *

Q: Does Nexis contain the full text of "Glory Amid Grief"?

A: I believe it does.

Q: Does Nexis contain the full text of the stories you contributed to Newsday?

A: I believe it does.

Q: Does Nexis contain the full text of every other article that appeared in the July 15th, 1991 issue of Sports Illustrated in which "Glory Amid [49] Grief" also appeared?

A: I don't know.

Exhibit C-6

Q: Haven't checked?

A: No.

* * *

[59] When did you first learn that "Baseball, a business, is striking out" was on Nexis?

Was it the same time that you discovered that "Glory Amid Grief" was?

A: Yes, to the best of my recollection.

Q: But when you found out about "Glory Amid Grief," which was the summer of 1991, as I recall your testimony, you were not researching in the Nexis database, were you?

A: No.

Q: Can you explain to me, then, when you first learned that "Glory Amid Grief" was on Nexis?

A: When I first learned that "Glory Amid Grief" was on Nexis, as opposed to another electronic database?

Q: Yes.

A: That would have been when — it would have been confirmed to me at a time a search was made in connection with this lawsuit.

* * *

Exhibit C-6

[63] * * *

Q: In the case of Newsday and in the case of Sports Illustrated, did you conduct the negotiations directly with those publishers over your article, to the extent that there were any negotiations?

A: Yes.

Q: Were there any negotiations in connection with the Newsday article?

A: No.

* * *

[66] * * *

Q: By 1991, the year in which you submitted "Glory Amid Grief" for publication, were you aware that major periodicals, such as Sports Illustrated, were available on microfilm and microfiche?

A: No, I don't think I was.

Q: By 1992, when you submitted your article to Newsday, were you aware that major periodicals such as Newsday were available on microfilm or [67] microfiche?

A: Yes.

Exhibit C-6

Q: What changed, if anything, between 1991 and 1992 with respect to the state of your knowledge regarding microfilm and microfiche?

A: My understanding of microfilm and microfiche was that major newspapers were available. Sports Illustrated is a magazine. Not a newspaper.

Q: Is that your understanding today that magazines are not included?

A: I've never seen a magazine on microfiche.

Q: Or microfilm?

A: Correct.

* * *

[79] * * *

Q: Isn't it the fact, Mr. Whitford, that even if Sports Illustrated's contract had used the words "North American magazine publication rights" [80] or maybe "North American serial publication rights," terms that you and I have discussed earlier and that I know you to be familiar with, that would not necessarily exclude CD-ROM or Nexis or microfilm versions of the magazine?

A: My understanding is that it would exclude those media.

* * *

Exhibit C-6

[81] * * *

Q: Let me try it another way, see if it eliminates the confusion.

Are you aware of whether as a matter of industry practice, publishers have taken the position for years that grants of North American rights or North American serial rights or North American magazine rights, which are often in my experience used interchangeably — do you agree with that?

A: Magazine rights and serial rights?

Q: Yes.

A: Yes.

[82] **Q:** Don't at least some publishers in the industry make it their practice to include within the scope of such rights their right to include free-lance contributions in electronic databases?

A: Let me answer by saying that I was shocked in July 1991 to discover that apparently Time, Inc. and Times Mirror included electronic rights in their definition of first North American serial rights.

* * * *

RULE 3(g) STATEMENT OF UNDISPUTED MATERIAL FACTS SUBMITTED ON BEHALF OF DEFENDANTS THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION AND UNIVERSITY MICROFILMS INC., DATED FEBRUARY 22, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 8678 (SS)

JONATHAN TASINI, MARY KAY BLAKELY, BARBARA GARSON, MARGOT MIFFLIN, SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs,

– v. –

THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION and UNIVERSITY MICROFILMS INC.,

Defendants.

RULE 3(g) STATEMENT OF UNDISPUTED MATERIAL FACTS SUBMITTED ON BEHALF OF DEFENDANTS THE NEW YORK TIMES COMPANY, NEWSDAY, INC., TIME INC., THE MEAD CORPORATION AND UNIVERSITY MICROFILMS INC.

Pursuant to Local Civil Rule 3(g) of this Court, defendants The New York Times Company (the "Times

Co."), Newsday, Inc. ("Newsday"), Time Inc. ("Time"), LEXIS/NEXIS ("NEXIS") (formerly The Mead Corporation), and UMI Company (formerly University Microfilms Inc.) ("UMI") (collectively, the "Defendants"), submit the following statement of material facts as to which there is no genuine issue to be tried:

A. *Background.*

1. *The Times Co.*

1. The Times Co. publishes, and at all times relevant to this action published, on a daily basis, the well-known and widely-read newspaper *The New York Times*. (Amended Complaint ¶ 17; Answer ¶ 17; Declaration of James E. Patterson ("Patterson Dec.") ¶ 1).

2. For many years, issues of *The New York Times* have been reproduced and distributed in a variety of formats, and are now available on paper, microfilm, microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals. (Patterson Dec. ¶ 3).

3. Each daily issue of *The New York Times*, going back to approximately 1851, is available on microfilm and/or microfiche, and has been for decades. (Patterson Dec. ¶ 4).

4. Issues of *The New York Times* have been available in the NEXIS computerized library of periodicals since approximately July 1983. Currently, each daily issue of *The New York Times*, going back to approximately June

1980, is available in the NEXIS computerized library. (Patterson Dec. ¶ 5; Declaration of Richard Petrosino ("Petrosino Dec.") ¶ 3).

5. Issues of *The New York Times* have been available on UMI CD-ROM products since approximately April 1992. Currently, each daily issue of *The New York Times*, going back to approximately January 1981, is available in this format. (Patterson Dec. ¶ 6; Declaration of John Riedel ("Riedel Dec.") ¶ 3).

6. Issues of *The New York Times Magazine* and *The New York Times Book Review* have been available on UMI CD-ROM products since approximately August 1990. Currently, each weekly issue of *The New York Times Magazine* and *The New York Times Book Review*, going back to approximately January 1988, is available in this format. (Patterson Dec. ¶ 7; Riedel Dec. ¶ 8).

7. The Times Co. provides, and at all times relevant to this action provided, the full text of all of the articles in each daily issue of *The New York Times* to NEXIS on a daily basis by electronically transmitting to NEXIS a complete copy of the same computer text-files the printers use to create that day's paper edition of *The New York Times*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that day's edition of the newspaper, as well as headlines, photograph captions and by-lines, and page and section references. (Patterson Dec. ¶ 8; Petrosino Dec. ¶ 5; Deposition of James E. Patterson ("Patterson Dep.") at 35-37; Deposition of Richard Petrosino ("Petrosino Dep.") at 36-37).

Rule 3(g) Statement

8. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety the complete, identical textual content of all of the articles that appeared in the paper edition of a particular daily issue of *The New York Times*. (Patterson Dec. ¶ 9; Petrosino Dec. ¶ 11; Patterson Dep. at 57-58).

9. The Times Co. provides, and at all times relevant to this action provided, the full text of all articles in each daily edition of *The New York Times* to UMI for publication in CD-ROM format. This is accomplished through LEXIS/NEXIS which, at the Times Co.'s request, provides, and at all times relevant to this action provided, to UMI, on a monthly basis, a magnetic tape containing a copy of the computer text-files the printers used to create each of the preceding month's daily editions of *The New York Times* as described in paragraph 7. Thus, UMI also receives the complete textual content of every article that appeared in the preceding month's daily editions of the newspaper, as well as headlines, photograph captions and by-lines, and page and section references. (Patterson Dec. ¶ 10; Riedel Dec. ¶¶ 4-6).

10. Each weekly edition of *The New York Times Book Review* and *The New York Times Magazine* is, and at all times relevant to this action was, made available to UMI for publication in CD-ROM format by providing UMI, on a weekly basis, paper copies of the preceding week's issues of *The New York Times Book Review* and *The New York Times Magazine*. (Patterson Dec. ¶ 12; Riedel Dec. ¶ 9).

Rule 3(g) Statement

2. *Newsday.*

11. Newsday publishes, and at all times relevant to this action published, on a daily basis, the well-known and widely-read newspaper *Newsday*. (Amended Complaint ¶ 18; Declaration of Robert Keane ("Keane Dec.") ¶ 1).

12. For many years, issues of *Newsday* have been reproduced and distributed in variety of formats, and are now available on paper and microfilm and in the NEXIS computerized library of periodicals. (Keane Dec. ¶ 10).

13. Each daily issue of *Newsday*, going back to approximately the 1970's, is available on microfilm and has been for decades. (Keane Dec. ¶ 11).

14. Each daily issue of *Newsday*, going back to approximately 1988, is available in the NEXIS computerized library of periodicals and has been since approximately 1988. (Keane Dec. ¶ 12).

15. Newsday provides, and at all times relevant to this action provided, to NEXIS the full text of all of the articles in each daily edition of *Newsday* by electronically transmitting to NEXIS on a daily basis a complete copy of the same computer text-files the printers use to create that day's paper edition of *Newsday*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that day's edition of the newspaper, as well as headlines, photograph captions and by-lines, and page and section references. (Keane Dec. ¶ 13; Deposition of Mary Anne Skinner ("Skinner Dep.") at 19, 22, 64-65).

Rule 3(g) Statement

16. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety the complete, identical textual content of all of the articles that appeared in the paper edition of a particular issue of *Newsday*. (Keane Dec. ¶ 14; Skinner Dep. at 19, 64-65).

3. *Time*.

17. Time publishes, and at all times relevant to this action published, on a weekly basis the well-known and widely-read magazine *Sports Illustrated*. (Amended Complaint ¶ 19; Declaration of Christopher Hunt ("Hunt Dec.") ¶ 1).

18. For many years, issues of *Sports Illustrated* have been reproduced and distributed in a variety of formats, and are now available on paper, microfilm and/or microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals. (Declaration of Lany McDonald ("McDonald Dec.") ¶ 3).

19. Each weekly issue of *Sports Illustrated*, going back to approximately August 1954, is available on microfilm and/or microfiche and has been for decades. (McDonald Dec. ¶ 4).

20. Weekly issues of *Sports Illustrated* have been available in the NEXIS computerized library of periodicals since approximately 1982. Each weekly issue of *Sports Illustrated*, going back to approximately December 1981, presently is available in the NEXIS computerized library. (McDonald Dec. ¶ 5).

Rule 3(g) Statement

21. Weekly issues of *Sports Illustrated* have been available on UMI CD-ROM products since approximately August 1990. Each weekly issue of *Sports Illustrated*, going back to January 11, 1988, presently is available on such products. (McDonald Dec. ¶ 6).

22. Time provides, and at all times relevant to this action provided, the full text of all of the articles in each weekly edition of *Sports Illustrated* to NEXIS on a weekly basis by delivering to NEXIS a complete copy of the same computer text-files the printers used to create that week's paper edition of *Sports Illustrated*. The copy transmitted to NEXIS includes the full text of all of the articles that appear in that week's edition of the magazine, as well as titles, photograph captions, by-lines and page references. (McDonald Dec. ¶ 7).

23. As a result of this process, a NEXIS user can, and at all times relevant to this action could, retrieve in its entirety the complete, identical textual content of all of the articles that appeared in the paper edition of a particular weekly issue of *Sports Illustrated*. (McDonald Dec. ¶ 8).

4. *NEXIS*.

24. At all times relevant to this action, NEXIS owned and operated a computerized library of periodicals available to the public, and at public and private schools, libraries and businesses nationwide. (Petrosino Dec. ¶ 1).

25. The computerized library of periodicals operated by NEXIS currently comprises approximately 5,800

different news and business information sources, including *The New York Times*, *Newsday*, and *Sports Illustrated*. (Petrosino Dec. ¶ 1).

26. From approximately July 1983 to the present, each daily issue of *The New York Times* has been placed in the NEXIS computerized library of periodicals. (Petrosino Dec. ¶ 3).

27. From approximately 1988 to the present, each daily issue of *Newsday* has been placed in NEXIS's computerized library of periodicals. (Petrosino Dec. ¶ 4).

28. NEXIS assembles, and at all times relevant to this action assembled, its collection of issues of *The New York Times* and *Newsday* by receiving on a daily basis from the Times Co. and Newsday, respectively, an electronic transmission of the complete computer text-files used by printers to create that day's paper editions of *The New York Times* and *Newsday*. (Petrosino Dec. ¶ 5; Patterson Dep. 34-37).

29. After receiving the electronic transmissions from the Times Co. and Newsday, NEXIS transfers, and at all times relevant to this action transferred, the content of each day's articles in their entirety, and without substantive revision, to its computerized library. As a result, the textual content of each daily edition of the *New York Times* and *Newsday* in the NEXIS computerized library is substantively identical to the daily editions printed on paper and the microfilm and microfiche editions of each newspaper. Present, but invisible to any user, are certain codes that have

been added for indexing and search purposes so that particular editions, and the information within them, can be located within the computerized library. (Petrosino Dec. ¶ 6).

30. From approximately 1982 to the present, each weekly issue of *Sports Illustrated* has been available in NEXIS's computerized library. (Petrosino Dec. ¶ 8).

31. NEXIS assembles its collection of issues of *Sports Illustrated* by receiving from Time on a weekly basis an electronic transmission of the complete computer text-files used by the printers to create that week's edition of *Sports Illustrated*. (Petrosino Dec. ¶ 9).

32. After receiving the electronic transmission from Time, NEXIS transfers the content of each week's articles in their entirety, and without substantive revision, to its computerized library. As a result, the textual content of each weekly edition of *Sports Illustrated* in the NEXIS computerized library is substantively identical to the weekly editions printed on paper and the microfilm, microfiche and CD-ROM editions of the magazine. As is true with respect to *The New York Times* and *Newsday*, present, but invisible to any user, are certain codes that have been added for indexing and search purposes so that particular issues and the information within them can be located within the computerized library. (Petrosino Dec. ¶ 10).

33. As a result of these steps, the complete, identical textual content of all of the articles in each daily edition of *The New York Times* and *Newsday*, and each weekly edition

of *Sports Illustrated*, is, and at all times relevant to this action was, available to users of the NEXIS computerized library within 24 hours of the publication date of these periodicals. (Petrosino Dec. ¶¶ 7, 11).

34. As a result of technical limitations, and in order to reduce expense and maximize load capacity, NEXIS does not include photographs in its computerized library, and it presents each day's articles in a standard full page format, rather than in a columnar format. Each NEXIS library entry does, however, include, with respect to each daily issue of *The New York Times* and *Newsday*, and each weekly issue of *Sports Illustrated*, the page and section references of articles as they appear in the paper editions. (Petrosino Dec. ¶ 12).

35. Because the NEXIS computerized library includes the complete, identical textual content of all articles appearing in each daily issue of *The New York Times* or *Newsday*, and each weekly issue of *Sports Illustrated*, *The New York Times Book Review* and *The New York Times Magazine* (with additional computer codes that assist research), a person using NEXIS can search for and retrieve in its entirety the complete text of any particular issue or information contained therein. (Petrosino Dec. ¶ 13).

5. *UMI.*

36. At all times relevant to this action, UMI produced and distributed products used for academic, business and other research purposes, including microfilm, microfiche and CD-ROMs containing daily issues of

newspapers and weekly or monthly issues of magazines. (Declaration of John Riedel ("Riedel Dec.") ¶ 1).

37. At all times relevant to this action, these products were available to, among others, public and private libraries, schools, universities and businesses throughout the United States. (Riedel Dec. ¶ 1).

38. From approximately April 1992 to the present, each daily issue of *The New York Times* has been reproduced in its entirety on a UMI CD-ROM product known as "The New York Times OnDisc" ("Times OnDisc"). These daily issues are available on Times OnDisc for all years from 1981 forward. (Riedel Dec. ¶ 3; Deposition of Patrick M. Guiant ("Guiant Dep.") at 13-14).

39. UMI assembles, and at all times relevant to this action assembled, Times OnDisc by receiving from NEXIS, on a monthly basis and at Times Co.'s request, a magnetic tape containing copies of the complete computer text-files used by the printers to create each of the preceding month's daily editions of *The New York Times*. (Patterson Dec. ¶ 10; Riedel Dec. ¶ 4).

40. After receiving the magnetic tape from NEXIS, UMI transfers the content of the articles in their entirety, and without revision, to CD-ROM discs. The textual content of each day's edition of *The New York Times* that appears on UMI's Times OnDisc product is substantively identical to the paper, microfilm and microfiche editions of the newspaper. Present, but invisible to any user, are certain codes that have been added to the Times OnDisc product for

indexing and search assistance purposes so that particular editions, and the information within them, can be located on the CD-ROM disc. The final product also includes abstracts of certain of the articles that appear in the daily edition, which are added for research purposes. (Riedel Dec. ¶ 5).

41. As a result of technical limitations, and in order to reduce expense and maximize load capacity, UMI does not include photographs on its Times OnDisc product, and it presents each day's articles in a standard full page format, rather than in a columnar format. For accuracy and research purposes, the Times OnDisc product also includes, with respect to each daily issue of *The New York Times*, the page and section references of all articles as they appear in the paper, microfilm, microfiche and NEXIS editions of the newspaper. (Riedel Dec. ¶ 6).

42. Because the Times OnDisc product includes the complete, identical textual content of all articles that appeared in each day's edition of *The New York Times* (with additional computer codes and some short abstracts that assist research), a person using Times OnDisc can, and at all times relevant to this action could, search for and retrieve in its entirety the complete text of any particular daily issue or information contained therein. (Riedel Dec. ¶ 7).

43. From approximately August 1990 to the present, each weekly issue of *The New York Times Magazine* and *The New York Times Book Review* has been reproduced in its entirety on a UMI CD-ROM product known as "General Periodicals Ondisc". The weekly issues of these periodicals are available for all years from approximately January 1988 forward. (Patterson Dec. ¶ 12; Riedel Dec. ¶ 8).

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44. UMI assembles, and at all times relevant to this action assembled, its "General Periodicals Ondisc" by digitally scanning complete copies of each of the preceding week's paper editions of *The New York Times Magazine* and *The New York Times Book Review*. Because these copies are digitally scanned page-by-page, the entire content of each weekly edition of *The New York Times Magazine* and *The New York Times Book Review* that appears on UMI's "General Periodicals Ondisc" is identical — including with respect to photographs and layout — to the paper, microfilm and microfiche editions. Present, but invisible to any user, are certain codes that have been added for indexing and search purposes so that particular issues, and the information within them, can be located on the CD-ROM disc. (Riedel Dec. ¶ 9).

45. Accordingly, a person using "General Periodicals Ondisc" can, and at all times relevant to this action could, search for and retrieve in its entirety the complete textual, photographic and advertising content of a particular weekly issue of *The New York Times Magazine* or *The New York Times Book Review* or information contained therein. (Riedel Dec. ¶ 10).

B. *Freelance Writers.*

46. Freelance writers, including plaintiffs, generally submit articles to publications either without first having made any arrangement with a publication to write an article, or after having been hired by a publication for the limited purpose of writing an article on a specific topic. (Declaration of Dennis Stern ("Stern Dec.") ¶ 3; Keane Dec. ¶ 3; Hunt

Dec. ¶ 3; Deposition of Jonathan Tasini ("Tasini Dep.") at 9-12; Deposition of Mary Kay Blakely ("Blakely Dep.") at 13-16; Deposition of Barbara Garson ("Garson Dep.") at 6-10; Deposition of Sonia Jaffe Robbins ("Robbins Dep.") at 27-29).

47. At all times relevant to this action, the Times Co., Newsday, and Time each published issues of their respective publications containing both articles written by their employees and articles submitted by freelance writers. (Stern Dec. ¶ 2; Keane Dec. ¶ 2; Hunt Dec. ¶ 2).

48. Although freelance writers may on occasion have had express agreements with the publishers of *The New York Times* and *Newsday* relating to the creation and submission of articles, most freelance writers sell, and at all times relevant to this action sold, articles to these publications without any such agreements. (Stern Dec. ¶ 4; Keane Dec. ¶ 4).

49. At all times relevant to this action, virtually all freelance assignments for *Sports Illustrated* were, and for many years had been, awarded and completed pursuant to a standard written agreement between the freelance writer and *Sports Illustrated*. The standard agreement referred to, among other things, the topic and length of the article, as well as the date on which it was due and the price to be paid. (Hunt Dec. ¶ 4).

50. At all times relevant to this action, the publishers of *The New York Times*, *Newsday* and *Sports Illustrated* published the entire contents of their respective periodicals

— including all articles obtained from freelance writers — in various media including paper, microfilm, microfiche, NEXIS and CD-ROM. In no case did a freelance writer successfully negotiate to prevent any of these publishers from exercising the right to publish its publication in formats other than paper, including electronic media. (Stern Dec. ¶ 5; Hunt Dec. ¶ 6; Keane Dec. ¶ 6; Tasini Supplemental Dep. at 24-26).

C. *The Articles at Issue.*

1. *The Tasini Articles.*

51. In or about September 1989, plaintiff Jonathan Tasini ("Tasini") submitted an article entitled "Striking Miners Dig In For Sit-In at Pittston Plant" to Newsday for publication. (Tasini Dep. at 183).

52. On the check by which Newsday paid Tasini for the article entitled "Striking Miners Dig In For Sit-In at Pittston Plant" ("Tasini's First Newsday Check"), which Tasini received in or about October 1989 (Tasini Dep. at 185), Newsday included the following printed endorsement:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

(Tasini Dep. Exhibit 119).

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53. This endorsement expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Tasini's article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

54. Tasini signed the back of Tasini's First Newsday Check and deposited it without altering the endorsement. (Tasini Dep. at 189; Tasini Dep. Exhibit 119).

55. In or about December 1989, Tasini submitted an article entitled "Labor Unions Fine-Tune Battle Strategies" to Newsday for publication. (Tasini Dep. at 219).

56. On the check by which Newsday paid Tasini for the article "Labor Unions Fine-Tune Battle Strategies" ("Tasini's Second Newsday Check"), Newsday included the same printed endorsement that had appeared on Tasini's First Newsday Check. (Tasini Dep. at 219-220; Tasini Dep. Exhibit 122A).

57. This endorsement again expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Tasini's article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

58. Tasini signed the back of Tasini's Second Newsday Check. (Tasini Dep. at 219).

59. At the time Tasini signed the back of this check, he altered the printed endorsement by crossing out the

reference to electronic library archives. (Tasini Dep. at 219-20).

60. Tasini made no effort to inform anyone at Newsday that he had altered the endorsement on Tasini's Second Newsday check. (Tasini Dep. at 220-21).

61. No one employed by Newsday became aware of Tasini's alteration to the endorsement on Tasini's Second Newsday Check until long after the article "Labor Unions Fine-Tune Battle Strategies" had been published and Tasini had been paid for the article. (Keane Dec. ¶ 9).

62. In or about March 1990, Tasini submitted an article entitled "Proposed Teamsters Election Rules Spark Criticism From Dissidents" to Newsday for publication. On the check by which Newsday paid Tasini for the article, ("Tasini's Third Newsday Check"), Newsday included the identical endorsement concerning rights as had appeared on Tasini's First Newsday Check and on Tasini's Second Newsday Check. (Tasini Dep. at 198-202; Tasini Dep. Exhibit 120).

63. This endorsement again expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Tasini's article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

64. Tasini signed the back of Tasini's Third Newsday Check and deposited it without altering the endorsement. (Tasini Dep. at 202; Tasini Dep. Exhibit 120).

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65. In 1991, Tasini submitted an article entitled "Can It Be Morning in Teamsterland?" to the Times Co. for publication. (Tasini Admissions 1, 1(a)).

66. Tasini did not have an express written or oral agreement with the Times Co. concerning the transfer or retention of any copyright rights in "Can It Be Morning in Teamsterland?". (Tasini Admissions 1(c), 1(d); Tasini Dep. at 105-06).

67. Tasini did not expressly limit, or attempt to expressly limit, the media in which the edition of *The New York Times* containing "Can It Be Morning in Teamsterland?" was to appear, nor did he otherwise expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in the article. (Tasini Admission 1(e); Tasini Dep. at 106).

68. In or about October 1992 and April 1993, Tasini submitted articles entitled, respectively, "Say Adios to American Jobs" and "A Union Boss' Labor Pains" to Newsday for publication. (Tasini Admissions 2, 2(a), 3, 3(a)).

69. Tasini did not have an express written or oral agreement with Newsday concerning the transfer or retention of any copyright rights in either "Say Adios to American Jobs" or "A Union Boss' Labor Pains." (Tasini Admissions 2(c), 2(d), 3(c), 3(d); Tasini Dep. at 150-52).

70. Tasini did not expressly limit, or attempt to expressly limit, the media in which the editions of *Newsday* containing "Say Adios to American Jobs" or "A Union Boss'

Labor Pains" were to appear, nor did he otherwise expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in either article. (Tasini Admissions 2(e), 3(e); Tasini Dep. at 150-52, 206).

71. On checks with which Newsday paid Tasini for the articles "Say Adios to American Jobs" and "A Union Boss' Labor Pains" ("Tasini's Fourth and Fifth Newsday Checks"), Newsday included the same printed endorsement that had appeared on Tasini's First Newsday Check, Tasini's Second Newsday Check and Tasini's Third Newsday Check. (Tasini Admissions 2(n), 2(p), 3(n), 3(p); Tasini Admissions Exhibits A, B; Tasini Dep. at 202-205).

72. These endorsements again expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Tasini's two articles and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

73. Tasini signed the backs of Tasini's Fourth and Fifth Newsday Checks. (Tasini Admissions 2(o), 3(o); Tasini Admissions Exhibits A, B).

74. At the time Tasini signed the backs of these checks, he altered the printed endorsements by crossing out the references to electronic library archives. (Tasini Admissions 2(p), 3(p); Tasini Admissions Exhibits A, B; Tasini Dep. at 204-205).

75. Tasini made no effort to inform anyone at Newsday that he had altered the endorsements on Tasini's Fourth and Fifth Newsday checks. (Tasini Dep. at 209-10).

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76. No one employed by Newsday became aware of Tasini's alterations to the endorsements on Tasini's Fourth and Fifth Newsday Checks until long after the articles "Say Adios to American Jobs" and "A Union Boss' Labor Pains" had been published and Tasini had been paid for the articles. (Keane Dec. ¶ 9).

2. *The Blakely Articles.*

77. In 1990, plaintiff Mary Kay Blakely ("Blakely") submitted articles entitled "The Heart Is a Large Place", "Who Did It? And What Does It All Mean?" and "Remembering Jane" to the Times Co. for publication. (Blakely Admissions 1, 1(a), 2, 2(a), 3, 3(a)).

78. Blakely had no express written or oral agreement with the Times Co. concerning the transfer or retention of any copyright rights in "The Heart Is a Large Place", "Who Did It? And What Does It All Mean?" or "Remembering Jane." (Blakely Admissions 1(c), 1(d), 2(c), 2(d), 3(c), 3(d); Blakely Dep. at 67-70).

79. Blakely did not expressly limit, or attempt to expressly limit, the media in which editions of *The New York Times* in which "The Heart Is a Large Place", "Who Did It? And What Does It All Mean?" or "Remembering Jane" were to appear, nor did she otherwise expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in any of these articles. (Blakely Admissions 1(e), 2(e), 3(e); Blakely Dep. at 67-70).

80. At the time Blakely submitted these articles to the Times Co., she was aware that major newspapers,

including *The New York Times*, were available in formats other than paper. (Blakely Admission 6; Blakely Dep. at 60-61).

3. *The Garson Articles.*

81. In 1991 and 1992, plaintiff Barbara Garson ("Garson") submitted the articles entitled "Health Care Vs. Death Care", "The Common Good Is Swept Aside By the 'Me Generation' ", "In 'JFK' We Feel the Pull of Our Lost Innocence" and "Networks That Serve the Unconnected" to Newsday for publication. (Garson Admissions 1, 1(a), 2, 2(a), 3, 3(a), 4, 4(a)).

82. Garson had no express written or oral agreement with Newsday concerning the transfer or retention of any copyright rights in "Health Care Vs. Death Care", "The Common Good Is Swept Aside By the 'Me Generation' ", "In 'JFK' We Feel the Pull of Our Lost Innocence" or "Networks That Serve the Unconnected." (Garson Admissions 1(c), 1(d), 2(c), 2(d), 3(c), 3(d), 4(c), 4(d); Garson Dep. at 99-100).

83. Garson did not expressly limit, or attempt to expressly limit, the media in which the editions of *Newsday* in which "Health Care Vs. Death Care", "The Common Good Is Swept Aside By the 'Me Generation' ", "In 'JFK' We Feel the Pull of Our Lost Innocence" or "Networks That Serve the Unconnected" were to appear, nor did she expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in any of these articles. (Garson Admissions 1(e), 2(e), 3(e), 4(e); Garson Dep. at 99-100).

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84. On checks with which Newsday paid Garson for the articles "Health Care Vs. Death Care", "The Common Good Is Swept Aside By the 'Me Generation' ", "In 'JFK' We Feel the Pull of Our Lost Innocence" and "Networks That Serve the Unconnected," (the "Newsday Garson Checks"), Newsday included the following printed endorsement:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

(Garson Admissions 1(n), 1(p), 2(n), 2(p), 3(n), 3(p), 4(n), 4(p); Garson Admissions Exhibits A, B, C, D).

85. This endorsement expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Garson's four articles and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

86. Garson signed the backs of each of the Newsday Garson Checks and deposited them without altering the endorsements. (Garson Admissions 1(o), 2(o), 3(o), 4(o); Garson Admissions Exhibits A, B, C, D; Garson Dep. at 106-08).

87. After the commencement of this action, Garson received an additional check from Newsday for another

freelance article published in *Newsday* bearing the printed endorsement described above. On that check, Garson altered the endorsement to remove any reference to electronic archival rights. (Garson Dep. at 111-13).

4. *The Mifflin Articles.*

88. Between 1990 and 1993, plaintiff Margot Mifflin ("Mifflin") submitted articles entitled "The Auteur Theory of Music Video Means No More Pretty Cliches", "Down by the River", "A Spectator in Morocco", "England's Dreaming", "They're Morocco Bound", "A Little Ishmael", "Beyond Recognition" and "The Desert" to the Times Co. for publication. (Mifflin Admissions 1, 1(a), 2, 2(a), 3, 3(a), 4, 4(a), 4(b), 5, 5(a), 6, 6(a), 7, 7(a), 8, 8(a)).

89. Mifflin had no express written or oral agreement with the Times Co. concerning the transfer or retention of any copyright rights in "The Auteur Theory of Music Video Means No More Pretty Cliches", "Down by the River", "A Spectator in Morocco", "England's Dreaming", "They're Morocco Bound", "A Little Ishmael", "Beyond Recognition" or "The Desert." (Mifflin Admissions 1(c), 1(d), 2(c), 2(d), 3(c), 3(d), 4(c), 4(d), 5(c), 5(d), 6(c), 6(d), 7(c), 7(d), 8(c), 8(d); Deposition of Margo Mifflin ("Mifflin Dep.") at 31, 46.)

90. Mifflin did not expressly limit, or attempt to expressly limit, the media in which the editions of *The New York Times* in which "The Auteur Theory of Music Video Means No More Pretty Cliches", "Down by the River", "A Spectator in Morocco", "England's Dreaming", "They're

Morocco Bound", "A Little Ishmael", "Beyond Recognition" or "The Desert" were to appear, nor did she otherwise expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in these articles. (Mifflin Admissions 1(e), 2(e), 3(e), 4(e), 5(e), 6(e), 7(e), 8(e); Mifflin Dep. at 46).

91. Prior to the time that Mifflin submitted these articles to the Times Co., she was aware that articles published in *The New York Times* were available on microfilm and/or microfiche. (Mifflin Dep. at 30).

5. *The Robbins Article.*

92. In 1991, plaintiff Sonia Jaffe Robbins ("Robbins") submitted an article entitled "I Say Legal, They Say Dirty" to Newsday for publication. (Robbins Admissions 1, 1(a)).

93. Robbins had no express written or oral agreement with Newsday concerning the transfer or retention of any copyright rights in "I Say Legal, They Say Dirty." (Robbins Admissions 1(c), 1(d); Robbins Dep. at 55, 81-82).

94. Robbins did not expressly limit, or attempt to expressly limit, the media in which the edition of *Newsday* in which "I Say Legal, They Say Dirty" was to appear, nor did she otherwise expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in this article. (Robbins Admission 1(e); Robbins Dep. at 55, 81-82).

Rule 3(g) Statement

95. On the check with which Newsday paid Robbins for the article entitled "I Say Legal, They Say Dirty" ("Robbins' Newsday Check") Newsday included the following printed endorsement:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

(Robbins Admissions 1(n), 1(p); Exhibit A).

96. This endorsement expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Robbins' article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

97. Robbins signed the back of Robbins' Newsday Check and deposited it without altering the endorsement. (Robbins Admission 1(o); Robbins Admissions Exhibit A; Robbins Dep. at 80-82).

6. *The Whitford Articles.*

98. In or about November 1990, plaintiff David S. Whitford ("Whitford") submitted an article entitled "It's Folly For the Major Leagues to Try to Remake the Minors" to Newsday for publication. (Deposition of David S. Whitford ("Whitford Dep.") at 90-92).

Rule 3(g) Statement

99. On the check with which Newsday paid Whitford for the article entitled "It's Folly For the Major Leagues to Try to Remake the Minors" ("Whitford's First Newsday Check"), which Whitford received on approximately December 17, 1990 (Whitford Dep. at 91-92), Newsday included the following printed endorsement:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

(Whitford Dep. Exhibit 126).

100. This endorsement expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Whitford's article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

101. After receiving Whitford's First Newsday Check, Whitford read the endorsement concerning electronic library archives and engaged in a discussion about the endorsement with Martin Hollander, a *Newsday* editor. (Whitford Dep. at 29-30, 92; Whitford Supplemental Dep. at 20-23).

102. After that discussion, Whitford signed the back of Whitford's First Newsday Check and deposited it without

altering the endorsement. (Whitford Dep. at 92, 94; Whitford Dep. Exhibit 126).

103. In or about 1991, Whitford submitted an article entitled "Glory Amid Grief" to *Sports Illustrated* for publication. (Whitford Admission 2(a); Whitford Dep. at 31).

104. Whitford had an express written agreement with *Sports Illustrated* concerning the submission of "Glory Amid Grief." (Hunt Dec. ¶¶ 4-5; Whitford Admission 2(f)).

105. Whitford's written agreement with *Sports Illustrated* expressly granted *Sports Illustrated* the right first to publish "Glory Amid Grief" in *Sports Illustrated*, without any express limitation as to the media in which the magazine could be published. (Hunt Dec. ¶ 5-6; Whitford Dep. Exhibit 123A).

106. Whitford did not expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in "Glory Amid Grief," in the agreement with *Sports Illustrated* or otherwise. (Hunt Dec. ¶ 5-6; Whitford Admission 2(g); Whitford Dep. at 86-87).

107. In 1992, Whitford submitted an article entitled "Baseball, A Business, Is Striking Out" to Newsday for publication. (Whitford Admission 1(a); Whitford Dep. at 66-67, 68).

108. Whitford had no express written or oral agreement with Newsday concerning the transfer or retention of any copyright rights in "Baseball, A Business, Is Striking

Out." (Whitford Admissions 1(c), 1(d); Whitford Dep. at 62-63).

109. Whitford did not expressly limit, or attempt to expressly limit, the media in which the edition of *Newsday* in "Baseball, A Business, Is Striking Out" was to appear, nor did he expressly reserve, or attempt to expressly reserve, any form of electronic publication rights in this article. (Whitford Admission 1(e); Whitford Dep. at 62).

110. On the check with which Newsday paid Whitford for the article entitled "Baseball, A Business, Is Striking Out" (Whitford's Second Newsday Check"), Newsday included the same endorsement concerning rights as had been included on Whitford's First Newsday Check. (Whitford Admissions 1(n), 1(p); Whitford Admissions Exhibit A; Whitford Dep. at 93-94).

111. This endorsement again expressly confirmed Newsday's understanding of the scope of the rights it had acquired to Whitford's article and reflected its practice, first begun in 1988, of reproducing and distributing its periodicals in electronic form. (Keane Dec. ¶¶ 8, 12).

112. Whitford signed the back of Whitford's Second Newsday Check and deposited it without altering the endorsement. (Whitford Admission 1(o); Whitford Admissions Exhibit A; Whitford Dep. at 94).

Rule 3(g) Statement

Dated: New York, New York
February 22, 1996

Respectfully submitted,

DEBEVOISE & PLIMPTON

By: s/ Bruce P. Keller
Bruce P. Keller (BK 9300)
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Defendants
The New York Times Company,
Newsday, Inc., Time Inc.,
LEXIS/NEXIS and UMI
Corporation

PLAINTIFFS' RESPONSE TO THE DEFENDANTS' RULE 3(g) STATEMENT, DATED MAY 21, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIV. 8678(SS)

JONATHAN TASINI, et al.

Plaintiffs

– against –

THE NEW YORK TIMES CO.,
NEWSDAY, INC., et al.

Defendants.

PLAINTIFFS' RESPONSE TO THE DEFENDANTS' RULE 3(g) STATEMENT

Pursuant to Local Civil Rule 3(g) of this Court, Plaintiffs Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins and David Whitford submit the following response to the Defendants' Rule 3(g) Statement.

A. *Background*

1. *The Times Co.*

1. Plaintiffs do not contest.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

2. While Plaintiffs do not contest the material facts that underlie many of the Defendants' statements,[1] they object to two characterizations. They object: (1) to the characterization of what is distributed by the publisher defendants to Mead and UMI, and by Mead and UMI to the users of their data bases, as "issues" (or "editions") of a periodical, and (2) to the characterization of NEXIS as a "computerized library of periodicals."

Although each of the publishers may transmit all of a day's articles at the same time to LEXIS/NEXIS, they have been so coded, indexed and configured that each is electronically a separate unit and can be searched for and retrieved independently of all other articles and elements that appeared together with it in an "issue" of *The New York Times*. Only articles are sent to LEXIS/NEXIS; photographs and graphic elements are excluded. See references to the record cited at ¶¶ 4, 6, and 8 below.

For the same reason, NEXIS cannot either accurately or appropriately be characterized as a "computerized library of periodicals." It is not a library of periodicals, it is a data base that contains the text of *articles* that were once published in a variety of periodicals. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 265-66 and 274-79 thereof and evidence cited therein; Affidavit of

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1. Plaintiffs admit that *The New York Times* appears in print, that microfilm copies of it are made and that articles from *The New York Times* are subsequently placed on NEXIS and incorporated into CD-ROMS. They deny, however, that "issues" of *The Times* have been reproduced and electronically distributed to Mead or UMI, or by Mead and UMI to their customers.

Linda Edgerty, dated March 13, 1996, Exh. 17[2] [hereinafter Edgerty Aff.]; Stipulation and Order, dated February 6, 1996, Exh. 24[3] [hereinafter Stipulation and Order]; Deposition of Richard Petrosino, dated April 14, 1995, Exh. 34 at 23-24 [hereinafter Petrosino Dep.].

3. Plaintiffs do not contest except to the extent noted in ¶ 2 regarding microfilm and microfiche, hereby incorporated herein.

4. Plaintiffs do not contest except to the extent noted in ¶ 2 with respect to the terms "issues" and "computerized library of periodicals." *See* Affidavit of Glenn Williams, dated March 13, 1996, Exh. 15, at 10-11 [hereinafter Williams Aff.]; Responses and Objections to Requests to Admit Addressed to Defendants New York Times Co., LEXIS/NEXIS, and University Microfilms, Inc., Exh. 21, at ¶ 11; Stipulation and Order, Exh. 24; Deposition of James E. Patterson, dated April 16, 1995, Exh. 33, at 21-22, 31, 39, 41 [hereinafter Patterson Dep.]; Petrosino Dep., Exh. 34, at 33, 125-26, 131-32; NYT/Mead Written Agreements, Exh. 38, at M003645, M003653-54; *see also* Affidavit of Emily

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2. All exhibit references are to exhibits submitted in support of Plaintiffs' Motion for Summary Judgment and referred to in the Affidavit of Emily Bass, dated March 15, 1996. The exhibits, which are extensive, are being submitted in six volumes, marked one through six.

3. To the extent that the two characterizations noted above and in ¶ 4 below are contrary to the Defendants' depositions, the Defendants are bound by their testimony. *See* Stipulation and Order, Exh. 24.

Bass, dated March 15, 1996, at ¶¶ 12, 28-41 and portions of the record cited therein [hereinafter "Bass Aff."].

5. Plaintiffs do not contest that *articles* from issues of *The New York Times* are available on UMI CD-ROM products and, on information and belief, have been since approximately 1992. Plaintiffs deny that "each daily issue" of *The New York Times* or "entire issues of The New York Times" are available for retrieval or display on UMI CD-ROM products at issue in this litigation. *See* Deposition of Patrick M. Guiant, dated April 13, 1995, Exh. 31 at 12, 14-15, 46-48, 65, 66-68, 81-82 [hereinafter Guiant Dep.]; *see also* Bass Aff. at ¶¶ 46, 52-54 and portions of the record cited to therein.

6. Plaintiffs do not contest that articles from the Book Review and Sunday Magazine *sections* of *The New York Times* are available on a UMI CD-ROM product, marketed under the name "General Periodicals OnDisc," and on information and belief have been since some time in 1990. Plaintiffs aver, however, that the Book Review and Magazine sections are only *sections of an issue* of *The New York Times*, i.e., the Sunday edition, and not discrete "issues" or "editions" in and of themselves. *See* Certification from the Copyright Office of the United States, Exh. 52. Plaintiffs deny that the entire Sunday issue of *The New York Times* or even all articles from that issue are included on General Periodicals OnDisc. *See* Guiant Dep., Exh. 31 at 12, 15, 65; *see also* Bass Aff. at ¶ 52 and portions of the record cited to therein. They aver that General Periodicals OnDisc contains articles from some 100 to 200 periodicals in addition to articles from the Book Review and Magazine sections of the

Sunday *Times*. *See* Guiant Dep., Exh. 31 at 66-67; *see also* Bass Aff. at ¶ 51.

7. Plaintiffs admit that The Times Co. provides and, at all times relevant to this action has provided, NEXIS on a daily basis *inter alia* with the full text of all articles from each day's *New York Times* and that it has done so by electronically transmitting each article to NEXIS in a discrete electronic envelope or computer file. Plaintiffs further admit that, as a general rule, all of the computer files containing articles from one day's edition of the paper are transmitted to NEXIS at the same time. Plaintiffs deny that the printing plant that prints *The New York Times* uses computer text-files to create the printed paper or that the computer files that are sent to the Times Co. type-setter (at an early stage in the editorial process) are the *same* computer files that are sent to NEXIS. The computer files that are sent to NEXIS are first configured so that there is only one article in each computer file. They are then enhanced with information and coding that relates to the particular article in each file. Then they are sent to NEXIS. *See* Bass Aff. at ¶ 13 and portions of the record cited therein.

8. Plaintiffs admit that a NEXIS user can and at all times relevant to the action could, retrieve all or nearly all of the articles that appeared in an issue of the paper *one by one*. Plaintiffs deny that a NEXIS user can, or could, retrieve an entire issue or edition of *The New York Times* or even all of the articles from an issue *together*, as a single unified work. They aver that the order in which individual articles can be retrieved bears no relation to the order in which they appeared in print or reflects the arrangement they had when

they appeared in print. *See* Affidavit of Timothy Smith, dated March 11, 1996, Exh. 16 at 3-4 [hereinafter Smith Aff.]; Responses and Objections to Requests to Admit Addressed to Defendants New York Times Co., LEXIS/NEXIS, and University Microfilms, Inc., Exh. 21 at ¶ 11; Petrosino Dep., Exh. 34 at 130; *see also* Bass Aff. at ¶¶ 39-41 and portions of the record cited to therein. They further aver that a NEXIS user cannot pull up any accompanying graphic material or photographs or view an article in relation to other articles that appeared with it on a page. *See* Patterson Dep., Exh. 33 at 31, 39, 41; *see also* Bass Aff. at ¶ 12 and portions of the record cited to therein.

9. Plaintiffs admit that once a month, by prior agreement with The Times Co., LEXIS/NEXIS (or "Mead") provides UMI with a magnetic tape containing copies of the enhanced computer files which correspond to articles that appeared in issues of *The New York Times* over the preceding month. Plaintiffs further admit that the print-visible content of the articles that are carried on the CD-ROMS is identical to the print-visible content of the articles that appeared in the paper. Plaintiffs deny that the printers or printing plants that print *The New York Times* use computer text-files to create the printed paper or that the computer files that are sent to the Times Co. type-setter (at an early stage in the editorial process) are the *same* computer files that are sent to NEXIS. UMI is sent copies of enhanced computer files, as well as key words and indexing terms. *See* Answer of the Defendants The New York Times Co., Newsday Inc., Time Inc., Mead Corporation, and University Microfilms Inc. To Amended Complaint, Exh. 8 at ¶¶ 55, 56, 98, 99, 270, 271; Responses and Objections to Requests to Admit Addressed

to Defendants New York Times Co., LEXIS/NEXIS, and University Microfilms, Inc., Exh. 21 at ¶¶ 21-22, 40; Petrosino Dep., Exh. 34 at 136; NYT/UMI Written Agreements, Exh. 39 at U006910-14; *see also* Bass Aff. at ¶ 43, and portions of the record cited to therein.

10. With the qualification noted in ¶ 6, plaintiffs do not contest the statement.

2. *Newsday, Inc.*

11. Plaintiffs do not contest.

12. Plaintiffs do not contest, except to the extent noted in ¶ 2, incorporated herein with respect to *Newsday*. *See* Responses and Objections to Requests to Admit Addressed to Defendants Newsday, Inc. and LEXIS/NEXIS, Exh. 22 at ¶ 55; Deposition of Mary Anne Skinner, dated April 6, 1995, Exh. 35 at 14, 30, 41 [hereinafter Skinner Dep.]; Newsday/Mead Written Agreements, Exh. 40 at M003709, M003719; *see also* Bass Aff. at ¶¶ 12, 28-41, 68, and portions of the record cited to therein.

13. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 3, incorporated herein in regard to *Newsday*.

14. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 4, incorporated herein in regard to *Newsday*.

15. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 7, incorporated herein

in regard to *Newsday*. *See* Bass Aff. at ¶¶ 13-15, and portions of the record cited to therein.

16. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 8, incorporated herein in regard to *Newsday*. *See* Responses and Objections to Requests to Admit Addressed to Defendants Newsday, Inc. and LEXIS/NEXIS, Exh. 22 at ¶ 11, 13; Skinner Dep., Exh. 35 at 12, 25; *see also* Bass Aff. at ¶¶ 39-41, and portions of the record cited to therein.

Moreover, a NEXIS user cannot retrieve the following additional features of Newsday's daily editions: graphic materials, photographs, death notices, weather reports and forecasts, sports statistics and results, and advertisements. *See* Responses and Objections to Requests to Admit Addressed to Defendants Newsday, Inc. and LEXIS/NEXIS, Exh. 22 at ¶ 55; Skinner Dep., Exh. 35 at 14, 30, 41; *see also* Bass Aff. at ¶ 12 and portions of the record referred to therein.

3. *Time, Inc.*

17. Plaintiffs do not contest.

18. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 2, incorporated herein with respect to *Sports Illustrated*. *See* references to the record cited at ¶¶ 21-22 below.

19. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 3, incorporated herein with respect to *Sports Illustrated*.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

20. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 4, incorporated herein with respect to *Sports Illustrated*. *See* Responses and Objections to Requests to Admit Addressed to Defendants Time, Inc. and LEXIS/NEXIS, Exh. 23 at ¶ 23; Time/Mead Written Agreements, Exh. 41 at T000007-27; *see also* Bass Aff. at ¶¶ 28-41, and portions of the record cited to therein.

21. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 5, incorporated herein with respect to *Sports Illustrated*. *See* Guiant Dep., Exh. 31, at 30-31, 67-70.

22. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 7, incorporated herein with respect to *Sports Illustrated*. *See* Bass Aff. at ¶¶ 13-14, 16, and portions of the record cited to therein.

23. Plaintiffs do not contest, except to the extent noted in their response set forth in ¶ 8, incorporated herein with respect to *Sports Illustrated*. *See* Responses and Objections to Requests to Admit Addressed to Defendants Time, Inc. and LEXIS/NEXIS, Exh. 23, at ¶ 25, 54, 55, 57; *see also* Bass Aff. at ¶¶ 39-41, and portions of the record cited to therein.

Moreover, a NEXIS user cannot pull up any accompanying graphic material or photographs, nor other features of *Sports Illustrated*'s weekly editions such as its cover page, table of contents or maps. *See* Responses and Objections to Requests to Admit Addressed to Defendants Time, Inc. and LEXIS/NEXIS, Exh. 23, at ¶ 23; Time/Mead Written Agreements, Exh. 41, at T000019.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

4. *NEXIS*

24. Plaintiffs admit that at all times relevant to this action, Mead (and/or LEXIS/NEXIS) operated a commercial information service known as NEXIS and that NEXIS makes *articles* from periodicals available via computer. Plaintiffs further admit that LEXIS/NEXIS sold subscriptions to NEXIS to the public and to businesses. Plaintiffs deny that NEXIS either is or functions as a computerized library of *periodicals*.

25. Plaintiffs do not contest that the verbal text of articles from the named periodicals and thousands of other sources are available to NEXIS subscribers. See response set forth in ¶ 2.

26. See responses set forth in ¶¶ 2, 4 and 25, hereby incorporated herein.

27. See responses set forth in ¶¶ 2, 4, 12, 14 and 25, hereby incorporated herein.

28. Plaintiffs do not contest, except to the extent set forth in ¶¶ 7 and 8, 15 and 16, and 22 and 23 hereby incorporated herein. Plaintiffs further deny that NEXIS assembles a collection of "issues" of *The New York Times* and *Newsday* and aver, instead, that it incorporates articles from issues of those newspapers into its existing collection of periodical articles. *See* Smith Aff., Exh. 16 at 3-4; Petrosino Dep., Exh. 34 at 129-32.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

29. Plaintiffs do not contest, except to the extent noted in ¶ 2 with respect to the terms "issue(s),[4] "edition(s)," and "computerized library" noted therein.

30. Plaintiffs do not contest, except to the extent noted in ¶¶ 2, 4, 18, 20 and 25, incorporated herein.

31. Plaintiffs do not contest, except to the extent noted in ¶¶ 22 and 28, incorporated herein.

32. Plaintiffs do not contest, except to the extent noted in ¶¶ 22 and 29, incorporated herein.

33. Plaintiffs do not contest.

34. With one exception,[5] Plaintiffs do not contest the factual matters stated, which begin with "NEXIS does not include . . ." Plaintiffs assert that the reasons for this exclusion are either matters of opinion and/or conclusions that are not supported by the record, and that regardless of the reasons for the deletions there are additional, purely commercial reasons. *See* Williams Aff., Exh. 15, at ¶¶ 27 and 37. Plaintiffs reiterate their objection to the inaccurate and misleading use of the terms "issue(s)," "edition(s)," and "computerized library."

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4. Plaintiffs understand the term "edition" used, e.g., in ¶ 29 of Defendants' Rule 3(g) Statement to be a synonym for the term "issue" used in ¶ 2.

5. Plaintiffs deny that jump cites or jump lines are included in NEXIS entries. *See e.g.*, NYT/Mead Written Agreements, Exh. 38, at M003645, M003653-54.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

35. Defendants' ¶ 35 is not a statement of fact, but a conclusion ("Because . . ."). Plaintiffs do not contest the major premise of the statement, except to the extent noted in ¶ 2 above. They deny it leads to the conclusion that a NEXIS user can therefore "retrieve in its entirety the complete text *of any particular issue*" of the periodicals in for the reasons stated in ¶¶ 2, 4, 8 (with respect to *The New York Times*), 12, 14, 16 (with respect to *Newsday*), and 18, 20, and 23 (with respect to *Sports Illustrated*) above and evidence cited therein, incorporated herein. What a person using NEXIS searches for and retrieves is individual articles. *See* Petrosino Dep., Exh. 34, at 130.

5. *UMI*

36. Plaintiffs do not contest, except to the extent noted in ¶¶ 2-4 above, incorporated herein by reference.

37. Plaintiffs do not contest.

38. Plaintiffs do not contest except to the extent stated in ¶¶ 2 and 4 above, incorporated herein.

39. Plaintiffs do not contest except to the extent stated in ¶ 7 regarding the use of the term "editions" and the identity of the computer text-files used by the printers, and aver that what UMI receives is a version created by NEXIS of the files sent by the Times Co. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 220-22 and evidence cited therein.

40. Plaintiffs do not contest, except to the extent noted in ¶¶ 2 and 4 with regard to "each day's edition" or

"particular editions", and ¶ 3 with regard to microfilm and microfiche.

41. With one exception, Plaintiffs do not contest the factual matters stated, which begin with "UMI does not include . . . ," and otherwise incorporate herein their response to ¶ 34 and evidence cited therein. Plaintiffs deny that jump cites or jump lines (which say "See page . . .") are included in CD-ROM entries.

42. Plaintiffs assert the same qualifications and objections as those asserted in ¶ 35, incorporated herein, because the source of the text reproduced on "New York Times OnDisc" is identical to that used to produce NEXIS. *See* Defendants' Rule 3(g) Statement at ¶ 39.

Plaintiffs agree that the addition of abstracts, while it increases the difference between the "OnDisc" product and NEXIS, does not alter the text of the articles reproduced.[6] Plaintiffs assert, however, that the creation of abstracts is for commercial, as well as "research" purposes, as the abstracts enable a reader to select or reject an article based upon a perusal of a summary of an article rather than the article in its entirety. *See* Guiant Dep., Exh. 31, at 51-52.

43. Plaintiffs deny that the Book Review and the Magazine sections of the Sunday *New York Times* are "issues," "editions," or "periodicals" or that" issues of these periodicals" are available on "General Periodicals OnDisc," or indeed any other medium. Plaintiffs admit that "General

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6. The abstract constitutes a derivative work.

Periodicals OnDisc" contains both a text-only (index or abstracts) data base and an image data base and that the image data base contains images of entire pages of the Book Review and Magazine sections (Articles As They Appear When Printed Out From The "General Periodicals OnDisc" CD-ROM, Exh. 4; Bass Aff. at ¶ 54). Plaintiffs further admit that discrete full-page images can be printed out at a printer attached to a UMI workstation. *See* Bass Aff. at ¶ 54; Other Documents Produced by UMI, Exh. 50, at U002972, U003129-30.

Plaintiffs deny that entire "issues" of the Sunday *New York Times* are available on General Periodicals OnDisc. (*See* Certification from the Copyright Office of the United States, Exh. 52)

44. Plaintiffs do not contest the facts set forth in the first sentence of ¶ 44 insofar as they describe the manner in which the *image* portion of the General Periodicals OnDisc data base is constructed. (The text-only part of General Periodicals OnDisc is assembled in a fashion similar to the NEXIS and Times OnDisc data bases. It contains indexes and abstracts of each article included in the data base. *See* Other Documents Produced by UMI, Exh. 50, at U001453-54, U002022, U002936, U002943, U002948.

Plaintiffs contest the conclusion ("Because . . .") set forth in the second sentence of ¶ 44 for the reasons stated in ¶ 43 above and for the further reason that it has no applicability to the text-only portion of General Periodicals OnDisc. Since the text-only portion of General Periodicals OnDisc, like NEXIS and New York Times OnDisc, is

searchable, it does not contain photographs or graphics, nor the lay-out of the paper. *See* Williams Aff., Exh. 15, at ¶¶ 22-23; Edgerly Aff., Exh. 17, at 8-9; Guiant Dep., Exh. 31, at 66, 73. Plaintiffs do not contest the assertion set forth in the third sentence except to the extent indicated in ¶ 35.

Plaintiffs further admit that the result of the marriage of these two data bases is an electronic product that enables customers to "locate" information from the Book Review and Magazine sections electronically. *See* Bass Aff. at ¶ 54. Depending on the hardware, this process will not enable the customer to view either the whole Magazine or Book Review, or any single page, directly on his or her computer screen. *See* Williams Aff., Exh. 15, at ¶ 42; Bass Aff. at ¶ 54; Other Documents Produced by UMI, Exh. 50, at U007320.

45. Plaintiffs do not contest, subject to the clarification set forth in ¶¶ 43 and 44. Stated otherwise, the end user can search for an individual article from the Book Review and/or Magazine sections and then print out the entire page — including the textual, photographic and advertising content of the page — in which the article appeared. He or she does not thereby print out the entire section of the paper, but only the page in question.

B. *Freelance Writers*

46. The evidence in this case shows that both Plaintiffs in this case and other freelance writers work pursuant to verbal assignments, assignment letters, written contracts for individual articles, contracts to provide periodic columns, and other arrangements, as well as by sending

unsolicited manuscripts. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 25, 42, 65, 69-71, 85; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 23, 25, 51, 57, 66-69, 83-87; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶ 7.

However, given the specific evidence presented in this case about the practice of *these* plaintiffs and *these* defendants, the issue of whether a general practice exists is irrelevant to this litigation.

47. Plaintiffs do not contest.

48. Plaintiffs do not contest for the reasons and on the basis set forth in ¶ 46.

49. Plaintiffs assert that the evidence relevant to the practice of Time, Inc. is that cited at ¶¶ 7-13 of Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc.; Agreement between David Whitford and *Sports Illustrated*, dated April 8, 1991, Exh. 36, at T000001-2 [Agreement between David Whitford and *Sports Illustrated*]; *see also* Current Time, Inc. Policy Re: Freelance Photographers, Exh. 44.

50. Plaintiffs do not contest the fact that articles of freelance writers were made available to the public via NEXIS and CD-ROM, and appeared on microfilm and microfiche, following their publication in print. Plaintiffs assert that, insofar as NEXIS and CD-ROM were concerned, this was done unlawfully. Plaintiffs do contest the assertion

that the Defendants published their periodicals or the "entire contents of their periodicals" via NEXIS and/or CD-ROM. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 136-37 and exhibits referred to therein; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶ 107 and evidence referred to therein; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶ 64 and evidence cited therein. See responses at ¶¶ 2, 4, 12, 14, 18 and 20, above, which are herein incorporated by reference.

Similarly, Plaintiffs do not contest the fact that some writers may have attempted to negotiate a provision that precluded the publisher defendants from suing their articles electronically and failed. Many more writers simply haven't negotiated on the issue. (*See* Defendants' Rule 3(g) Statement at ¶ 48.) Still others have negotiated agreements in which they retain such rights because they have not been expressly transferred. *See* Agreement between David Whitford and *Sports Illustrated*, Exh. 36.

Plaintiffs aver that they themselves were unaware prior to the publication of the articles that any Defendant intended, planned or had contracted to sell their article for distribution in any electronic medium. See evidence cited at Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 38-46 thereof, inclusive; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶¶ 14-15; Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶ 35. Plaintiffs also note that their subsequent efforts to prevent publication of their work in electronic data bases were frustrated by Defendants' superior

bargaining power. *Id*, and see Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶ 53-54; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 47 and 61 and exhibits referred to within.

C. *The Articles At Issue*

1. *The Tasini Articles*

51. Plaintiffs do not contest the facts stated, but deny this is, as Defendants assert, an "article at issue" in this litigation.

52. Plaintiffs do not contest the fact that Newsday stamped that legend on the back of the check in agate-size type, and refer the Court to the qualification stated in ¶ 51 above.

53. Plaintiffs do not contest the fact that Newsday, Inc. began to place articles from its publication on NEXIS some time in 1988.

Plaintiffs deny that the endorsement confirmed Newsday's understanding of the scope of rights it had acquired and aver that it represented an attempt by Newsday to retroactively and surreptitiously acquire more rights. *See* Newsday Checks With Legend Stamped On Back, Exh. 47, at N000150-53; *see also* Memorandum of Law in Support of Defendants' Motion for Summary Judgment, at 23-33. Plaintiffs further deny that Newsday has or had a practice of reproducing and distributing its periodical in electronic form. (See responses above at ¶¶ 2, 12 and 14.) Plaintiffs deny

that a legend stamped on the back of a check issued in payment of an already performed service could in any event operate to modify the terms of a pre-existing agreement. See, evidence cited at Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 25-38 thereof. *See also* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 83-92 and evidence cited therein. This is ultimately a disagreement of law, not of fact, however.

Plaintiffs further deny that a legend on the back of a check could "reflect" any "practice" other than that of stamping the legend. This is a matter of logic, not fact.

54. Plaintiffs do not contest, except as stated in ¶ 51 above. Once Plaintiff Tasini took note of the legend he was troubled by it and did not understand exactly what it meant. *See* Deposition of Jonathan Tasini, dated February 5, 1996, at 175-184 [hereinafter Tasini Dep.].

55. Plaintiffs do not contest, except as stated in ¶ 51 above.

56. Plaintiffs incorporate herein their response at ¶ 52 above.

57. Plaintiffs incorporate herein their response at ¶ 53 above.

58. Plaintiffs do not contest.

59. Plaintiffs do not contest, and submit Tasini's action reflects the state of mind referred to in ¶ 54 above,

and Plaintiff's express lack of consent to the exercise by the Times Co. of any rights beyond first or one-time North American rights.

60. Plaintiffs agree Tasini did not separately inform Newsday of his alteration of the legend for fear he would lose his payment for the article. *See* Tasini Dep. at 201, 209, and 212.

61. Plaintiffs do not contest.

62. Plaintiffs do not contest, except as stated in ¶ 51 above.

63. Plaintiffs incorporate herein their response at ¶ 53 above.

64. Plaintiffs do not contest.

65. Plaintiffs do not contest.

66. Plaintiffs do not contest. The converse is also true, however. *See* Plaintiffs Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 24-29 and evidence cited therein.

67. Plaintiffs do not contest, but aver: (1) that the converse is also true, i.e., that the Defendants did not expressly acquire or attempt to expressly acquire the electronic rights in question (see evidence cited in ¶ 66, above); and (2) that, as the owner of the copyrights in his articles, Plaintiff Tasini was not required to expressly reserve

rights in order to retain them. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 4-5; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 4-5; Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶¶ 5-6; *see also* Correspondence from Bruce Keller, Esq. To Emily Bass, Esq., dated March 30, 1995, Exh. 25.

68. Plaintiffs do not contest.

69. Plaintiffs reiterate their response to ¶ 66. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 21-22 thereof.

70. Plaintiffs do not contest, except to the extent expressed in ¶ 67 above.

71. Plaintiffs do not contest.

72. Plaintiffs incorporate herein their response at ¶ 53 above.

73. Plaintiffs do not contest.

74. Plaintiffs object to this statement on the ground that it is a conclusion, not a statement of fact. They admit that Plaintiff Tasini took no action other than altering the endorsement, and contend that as a matter of law that action was calculated to communicate his objection

75. Plaintiffs incorporate herein their response at ¶ 60 above.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

76. Plaintiffs incorporate herein their response at ¶ 61 above.

2. *The Blakely Articles*

77. Plaintiffs do not contest.

78. Plaintiffs do not contest, but note that "Remembering Jane" was the object subsequently of a written syndication agreement. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶ 69 thereof and evidence cited therein.

The converse of Defendants' statement is also true. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶ 76 thereof and evidence cited therein.

79. Plaintiffs incorporate herein their response at ¶ 67 above. They further assert that Plaintiff Blakely's understanding of the verbal contracts she entered into with the publisher were "for first North American serial rights only." Blakely Dep. at 36, line 20 and *id.* at 43, line 24 cited at Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times ¶ 73 and id. at ¶¶ 76 and 77 and evidence cited therein. And see evidence cited *id.* at ¶ 306 thereof as it pertains to *The New York Times*.

80. Plaintiffs do not contest the statement insofar as it suggests that Plaintiff Blakely was aware that a copy of *The New York Times* was available on microfilm.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

As of the date of her deposition in this litigation, however, she did not know how to use NEXIS and, at the time she submitted her articles, had no direct experience with computer data bases. She had a general knowledge that "some newspapers and magazines" were "on-line." Blakely Dep. at 38, lines 9-18; at 58, line 23.

3. *The Garson Articles*

81. Plaintiffs do not contest.

82. Plaintiffs do not contest. However, the converse is also true. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶ 6 and evidence cited therein; ¶¶ 17-19 thereof and evidence cited therein; ¶ 24, 38, 39 thereof with respect to Plaintiff Garson and evidence cited therein.

83. Plaintiffs incorporate herein their response at ¶ 67, above, citing in support of the converse, Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 38-39, 43-44, 71-77 and evidence cited therein.

84. Plaintiffs do not contest. See ¶ 52, above.

85. Plaintiffs incorporate herein their response at ¶ 53 above.

86. Plaintiffs do not contest. Plaintiff Garson does not recall having taken note of the endorsement or having realized that it was anything other than a legend stamped by the bank. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 78-79.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

87. Plaintiffs do not contest. After learning in the course of this litigation of the significance Newsday placed on the legend, Plaintiff Garson subsequently struck out the offending language.

4. *The Mifflin Articles*

88. Plaintiffs do not contest.

89. Plaintiffs do not contest. The converse is also true, however. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶¶ 6, 50 and evidence cited therein.

90. Plaintiffs incorporate herein their response to ¶ 67, above, citing in support of the converse, Plaintiffs' Rule 3(g) Statement With Respect to Defendant New York Times at ¶ 50 and evidence cited therein. *And see* ¶¶ 53-54 thereof and evidence cited therein. Plaintiff's conduct was the result of her understanding that since she had not affirmatively granted electronic rights, she retained such rights. *Id.* at ¶¶ 55-58 and evidence cited therein.

91. Plaintiffs do not contest.

5. *The Robbins Articles*

92. Plaintiffs do not contest.

93. Plaintiffs do not contest. The converse is also true, however, i.e., it is undisputed that Plaintiff did not expressly convey, transfer, license or assign any right other

than one-time publication in a daily periodical. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 6, 16, 24, 38-39 and evidence cited therein.

94. Plaintiffs incorporate herein their response at ¶ 67 above, citing in support of the converse, Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 43-44 and evidence cited therein regarding Plaintiff Robbins.

95. Plaintiffs do not contest. See ¶ 52, above.

96. Plaintiffs incorporate herein their response at ¶ 53 above and evidence cited therein.

97. Plaintiffs do not contest. They aver, however, that Plaintiff Robbins did not pay particular attention to the legend and believed it might be standard language designating the endorsement line and warning not to endorse above it. Deposition of Sonia Jaffe Robbins, dated April 11, 1995, at 80, lines 5-81, especially line 14 [hereinafter Robbins Dep.].

6. *The Whitford Articles*

98. Subject to the qualification set forth in ¶ 51, Plaintiffs do not contest.

99. Subject to the qualification set forth in ¶ 52, Plaintiffs do not contest.

100. Plaintiffs incorporate herein their response at ¶ 53 above and evidence cited therein, and Deposition of

David S. Whitford, dated April 10, 1995, at 28-29 [hereinafter Whitford Dep.].

101. Plaintiffs admit that Plaintiff Whitford, upon seeing the legend, called his editor at *Newsday* and asked "What are you trying to do?" (Whitford Dep. at 30, lines 1-7; 89-90.) His editor did not know what the language in the legend meant (Whitford Dep. at 30, lines 12-13).

102. Plaintiffs admit, *but see*, the response given by the Newsday editor. Whitford Dep. at 30, lines 12-13; *see also* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶¶ 68-69 and evidence cited therein, and ¶ 33 and evidence cited therein, and ¶¶ 38-40 and evidence cited herein pertaining to Plaintiff Whitford.

103. Plaintiffs do not contest.

104. Plaintiffs do not contest.

105. Plaintiffs do not contest that the contract granted "the exclusive right first to publish the Story in the Magazine," the non-exclusive right "to license republication of the Story . . . in other publications . . ." for 50% of the net proceeds from republication, and "the right to republish the Story" in other publications of Time, Inc. for payment of "the then prevailing rates of the publication in which the story is republished." Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶ 10 and evidence cited therein (citing letter agreement at 000563-64). Plaintiffs deny that the first publication right could be read as referring to anything but *Sports Illustrated* magazine, i.e., the print publication. *Id.*

Plaintiffs' Response to Defendants' Rule 3(g) Statement

106. Plaintiffs do not contest the fact that Plaintiff Whitford did not explicitly reserve "electronic rights" in so many words, but aver that he was not required to do so. Time, Inc. was required to expressly acquire electronic rights if it wished to exercise them. Since Time, Inc. didn't expressly acquire such rights and Plaintiff Whitford didn't expressly convey them, he retained electronic rights in his article. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Time, Inc. at ¶ 11-15 and evidence cited therein.

107. Plaintiffs do not contest.

108. Plaintiffs do not contest that Plaintiff Whitford did not attempt to or expressly reserve electronic rights; however, the converse is also true. *See* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 6, 24, 38-39, 43, 44 and evidence cited therein pertaining to Plaintiff Whitford.

109. Plaintiffs herein incorporate their response to ¶ 67, above, citing in support of the converse, the evidence cited in ¶ 108 above and ¶ 64 of Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday.

110. Plaintiffs do not contest. See ¶ 52, above.

111. Plaintiffs incorporate herein their response at ¶ 53 above. *See also* Plaintiffs' Rule 3(g) Statement With Respect to Defendant Newsday at ¶¶ 64-69 and evidence cited therein.

112. Plaintiffs do not contest, but also incorporate the evidence cited in ¶ 111 above.

Plaintiffs' Response to Defendants' Rule 3(g) Statement

Dated: May 21, 1996
New York, New York

s/ Emily Bass
Emily M. Bass, Esq. (EB-2888)
Burstein & Bass
330 Madison Avenue
11th floor
New York, N.Y. 10017-5001
(212) 297-3383

Attorneys for Plaintiffs
Jonathan Tasini, Mary Kay
Blakely, Barbara Garson,
Margot Mifflin, Sonia Jaffe
Robbins and David Whitford

Of Counsel:

Jordan Rossen, Esq. (JR-6176)
8000 East Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216

TO: Bruce P. Keller (BK-9300)
Debevoise & Plimpton
875 Third Avenue
New York, N.Y. 10022
(212) 909-6000

Attorneys for Defendants
The New York Times Co.,
Newsday, Inc., Time Inc.,
LEXIS-NEXIS, and
University Microfilms, Inc.

DECLARATION OF KENNETH A. TILLMAN IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE, DATED APRIL 11, 2000

(SUBMITTED TO THE SECOND CIRCUIT AFTER ITS AMENDED OPINION OF FEBRUARY 25, 2000)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Second Circuit Docket No.
97-9181(L),
97-9650 (CON)

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs-Appellants,

BARBARA BELEJACK; DANIEL LAZARE; JOAN OLECK and LINDSY VAN GELDER,

Plaintiffs,

– against –

THE NEW YORK TIMES COMPANY; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; MEAD DATA CENTRAL CORP. and UNIVERSITY MICROFILMS INTERNATIONAL,

Defendants-Appellees,

THE ATLANTIC MONTHLY COMPANY,

Defendant,

Declaration of Kenneth A. Tillman

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., ET AL.

Amicus Curiae.

DECLARATION OF KENNETH A. TILLMAN IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE

KENNETH A. TILLMAN hereby declares as follows:

1. I am Senior Vice President of Information Partnerships at Bell & Howell Information and Learning Company, formerly known as University Microfilms International (collectively "UMI"). I am responsible for the acquisition of intellectual property rights from information providers as well as expanding online distribution of that information by developing strategic alliances with key publishers. I have held this position since 1997. My previous positions with UMI include Vice President, Publisher Relations; Vice President, Periodicals & Newspapers; Manager, Newspaper Publishing & Serials Administration; Manager Customer Relations; and Marketing and Sales Analyst. I have been with UMI for 29 years.

2. I submit this declaration in support of Appellees' motion for a stay of this Court's mandate pending filing of a petition for certiorari with the U.S. Supreme Court.

UMI CD-ROM Products

3. UMI reproduces and distributes copies of periodicals, used for academic, business and other research purposes, on

microfilm, microfiche, CD-ROMs and online. These copies are available to, among others, public and private libraries, schools, universities and businesses throughout the United States. For 50 years, UMI produced these copies exclusively on microfilm. Beginning in 1988, UMI also began to reproduce and distribute certain of them on CD-ROMs.

4. UMI manufactures and distributes the two CD-ROM products at issue in this case: New York Times OnDisc ("NYTO"), which contains the full texts of complete editions of *The New York Times* since approximately January 1981, and General Periodicals OnDisc ("GPO"), which contains the full texts, in digital image format, of numerous periodicals, including *The New York Times Magazine* and *The New York Times Book Review* since approximately January 1988.

5. As part of their prayer for relief in this case, Appellants have asked for an injunction that would prevent UMI "from in any way copying, making a derivative work from, distributing, broadcasting, communicating or transmitting electronic copies of or otherwise electronically exploiting" Appellants' articles that are listed in the complaint.

6. Complying with this injunction would require altering the NYTO and GPO products so they no longer include Appellants' articles named in the complaint, which appeared in *The New York Times*, *The New York Times Magazine* and *Book Review* between 1990 and 1993. This cannot be done without enormous effort.

7. Once manufactured, an individual CD-ROM disc cannot be altered, making it impossible to delete Appellants' articles

from existing discs. The only way for UMI to comply with such an injunction would be to recall from distribution any discs containing Appellants' articles — which is, as a practical matter, impossible. Additionally, UMI would have to destroy any such existing discs and to cease distributing such discs in the future.

New York Times OnDisc ("NYTO")

8. NYTO is a text-only product. UMI assembles the NYTO product by receiving, on a monthly basis, a magnetic tape containing copies of the complete text files of each of the preceding month's daily editions of *The New York Times*. UMI transfers these editions in their entirety to CD-ROM discs.

9. Each CD-ROM disc in the NYTO database contains an entire year's complete issues of *The New York Times*.

10. Because Appellants' articles appeared in *The New York Times* over the course of the four years 1990-1993, an injunction that prevented UMI from distributing those articles would, therefore, effectively prevent UMI from distributing any NYTO discs covering the years 1990-1993 and force UMI to expunge the entire complete *New York Times* for those years from its NYTO product line.

General Periodicals OnDisc ("GPO")

11. Unlike the text-only NYTO, GPO is an image-based product. UMI assembles GPO by digitally scanning complete copies of each of the paper editions of complete periodicals.

When used on a computer, it displays a digital photographic image of each page of a given periodical, just like microfilm.

12. A complete year's edition of GPO may consist of over 100 discs, with each single disc containing numerous complete periodicals that were published on approximately the same date.

13. Therefore, an injunction that required UMI to delete Appellants' articles from the GPO database would, as a practical matter, result in UMI's removing the discs containing Appellants' articles from future shipments of the GPO product. To illustrate, Appellants' articles appeared in *The New York Times Magazine* and *The New York Times Book Review* in various weeks during the four years 1990-1993. To delete one of those articles, which appeared in the *New York Times Book Review* for September 22, 1990, would require removing from circulation the entire disc on which the *Book Review* edition containing that article resides. This, in turn, would remove not only Appellant's article, but also the complete *Book Review* for that date. It also would remove every other periodical, in addition to the *Book Review*, that is stored on that particular disc, leaving a gap of several days' publications that would be unavailable to GPO's customers.

Harm to UMI

14. UMI has built its reputation on, among other things, its ability to supply complete editions of newspapers and magazines to its customers on microfilm, microfiche and CD-ROM, and its ability to supply a complete historical archive of those publications. An injunction that requires

the deletion of some articles from that archive would wreak enormous harm. Its practical result would be the deletion of entire periodical issues from the CD-ROM products. In the case of NYTO, it would result in the deletion of entire years' editions of *The New York Times*. UMI's inability to supply a complete historical archive would inevitably cause loss of customers and good will built up over decades. Further, it would damage the reputation of the UMI CD-ROM products and endanger their survivability, as customers retreat to microfilm and microfiche as the only media in which they are assured that complete texts are reproduced.

15. The harm to the public also would be enormous. For the past 20 years, public and private libraries have been relying more and more on electronic archives like the UMI CD-ROM products. Many libraries have substantially reduced their archives of printed newspapers and periodicals in reliance on the continued availability and completeness of electronic archives and facsimile editions. This Court's decision will reverse that process and force libraries to retain paper copies as the only reliable archive. This will cause a tremendous waste of time, space and effort, as libraries turn back the clock and replicate in print the complete resources that are no longer available electronically.

16. Appellant Tasini has threatened to "shut down" the UMI CD-ROM databases and "every database in the country," Felicity Barringer, *Freelancers Win Appeal in Copyright Suit*, The New York Times, Sept. 28, 1999, at C1, with a "tidal wave of lawsuits" on behalf of other freelance writers whose works also have been reproduced on NEXIS and CD-ROMs. Jason Williams, *Court Decision Could Leave*

Gaps in Archives, Editor & Publisher Magazine, Oct. 2, 1999, at 5. To reduce this risk, UMI would have to consider removing from circulation all CD-ROM discs containing any freelance articles, in addition to those that contain Appellants' articles. It would be impossible, as a practical matter, to locate all such articles, which would include travel pieces, book reviews, stories sent in by stringers, letters to the editor, Op-ed pieces and unsolicited articles submitted by public officials and other citizens. The number of such articles could be in the thousands or hundreds of thousands. Because of the logistical impossibility of identifying all such articles and removing the discs containing them, UMI's only recourse might be to remove from circulation all CD-ROMs from past years and, for future years, circulate only those discs that contain publications whose publishers have secured the rights to reproduce electronically all articles they contain. This would make the UMI CD-ROM products useless as a historical archive.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed at Ann Arbor, Michigan, on April 11, 2000.

s/ Kenneth A. Tillman
Kenneth A. Tillman

DECLARATION OF FRED T. LEFTRICT, JR. IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE, DATED APRIL 11, 2000

(SUBMITTED TO THE SECOND CIRCUIT AFTER ITS AMENDED OPINION OF FEBRUARY 25, 2000)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Second Circuit Docket No.
97-9181(L),
97-9650 (CON)

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs-Appellants,

BARBARA BELEJACK; DANIEL LAZARE; JOAN OLECK and LINDSY VAN GELDER,

Plaintiffs,

– against –

THE NEW YORK TIMES COMPANY; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; MEAD DATA CENTRAL CORP. and UNIVERSITY MICROFILMS INTERNATIONAL,

Defendants-Appellees,

THE ATLANTIC MONTHLY COMPANY,

Defendant,

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., ET AL.

Amicus Curiae.

DECLARATION OF FRED T. LEFTRICT, JR. IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE

FRED T. LEFTRICT, JR. hereby declares as follows:

1. I am Vice President, Marketing of LEXIS/NEXIS. I am responsible for leading all marketing for the NEXIS database of periodicals, including research, pricing, creative development and marketing management for NEXIS target markets. I have held this position since September 1999. I joined LEXIS/NEXIS in 1997 as Senior Director for Marketing Research and Strategic Planning for LEXIS, in which role I led the market research for online legal products and services as well as marketing analysis.

2. I submit this declaration in support of Appellees' motion for a stay of this Court's mandate pending filing of a petition for certiorari with the U.S. Supreme Court.

The NEXIS Database of Periodicals

3. The NEXIS computerized library of periodicals is available to the public, via public and private schools, libraries and businesses nationwide and to individuals through dial-up and Internet access. It currently stores information from over 18,000 different news and business sources, including electronic copies of *The New York Times*, *Newsday*, and *Sports Illustrated*.

4. NEXIS contains each daily issue of *The New York Times* since approximately June 1980, each daily issue of *Newsday* since approximately 1988, each weekly issue of *Sports Illustrated* since approximately 1982 and complete issues of other periodicals dating as far back as 1975.

5. As part of their prayer for relief in this case, Appellants have asked for an injunction that would prevent LEXIS/NEXIS "from in any way copying, making a derivative work from, distributing, broadcasting, communicating or transmitting electronic copies of or otherwise electronically exploiting" Appellants' articles.

6. Appellant Tasini also has threatened to "shut down" NEXIS and "every database in the country," Felicity Barringer, *Freelancers Win Appeal in Copyright Suit*, The New York Times, Sept. 28, 1999, at C1, with a "tidal wave of lawsuits" on behalf of other freelance writers whose works also have been reproduced on NEXIS and CD-ROMs. Jason Williams, *Court Decision Could Leave Gaps in Archives*, Editor & Publisher Magazine, Oct. 2, 1999, at 5.

7. To reduce this risk, NEXIS could be forced to delete many other freelance articles in addition to Appellants', because it would be impossible, as a practical matter, for publishers whose publications appear on NEXIS to identify, locate and negotiate with all freelance writers whose works they have published since NEXIS began storing their periodicals. The number of works lost to NEXIS and the public through this process could number in the tens or hundreds of thousands.

Harm to LEXIS/NEXIS

8. NEXIS has built its reputation on its ability to supply complete issues of newspapers and magazines to its customers electronically, and its ability to supply a complete historical archive of those publications. The deletion of articles from that archive would wreak enormous harm.

9. Such deletion would also do great harm to the public. Loss of public confidence in the completeness of the NEXIS archive will inevitably mean lost time and extra labor for researchers who must double-check their electronic research against print editions to be sure the complete periodical has been searched.

10. Further, if publishers require NEXIS to delete great numbers of freelance articles from its database, identifying such articles would be a logistical nightmare and incredibly disruptive, consuming thousands of hours that otherwise would and should be spent on the continual maintenance and updating of NEXIS.

11. The result of such deletions — if they could be accomplished at all — would be a NEXIS database riddled with gaps where many thousands of freelance articles once were. Researchers would therefore be unable to rely on their searches of the now-incomplete NEXIS library to uncover all pertinent materials. The inability of NEXIS to guarantee its customers a complete historical archive would inevitably cause loss of customers and good will built up over decades. Further, it would damage the reputation of the NEXIS database now and in the future, because customers would

choose to retreat to microfilm, microfiche and print — if print copies still exist — as the only media in which they are assured that complete texts are reproduced.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Miamisburg, Ohio, on April 11, 2000.

s/ Fred T. Leftrict, Jr.
Fred T. Leftrict, Jr.

DECLARATION OF ALAN GREENGRASS IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE, DATED APRIL 11, 2000

(SUBMITTED TO THE SECOND CIRCUIT AFTER ITS AMENDED OPINION OF FEBRUARY 25, 2000)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Second Circuit Docket No.
97-9181(L),
97-9650 (CON)

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Plaintiffs-Appellants,

BARBARA BELEJACK; DANIEL LAZARE; JOAN OLECK and LINDSY VAN GELDER,

Plaintiffs,

– against –

THE NEW YORK TIMES COMPANY; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; MEAD DATA CENTRAL CORP. and UNIVERSITY MICROFILMS INTERNATIONAL,

Defendants-Appellees,

THE ATLANTIC MONTHLY COMPANY,

Defendant,

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., ET AL.

Amicus Curiae.

DECLARATION OF ALAN GREENGRASS IN SUPPORT OF DEFENDANTS-APPELLEES' MOTION FOR STAY OF MANDATE

ALAN GREENGRASS hereby declares as follows:

1. I am President of Times On-Line Services at The New York Times Company (the "Times Co."). I am responsible for two operating groups: New York Times Index and Times On-Line Services. These groups create the full text database of *The New York Times* and abstract databases of the *Times* and other newspapers. They transmit these databases to LEXIS/NEXIS and other online partners. I am also responsible for working on production of *The New York Times* microform and CD-ROM products. My previous position with the Times Co. was director of Index Operations. I have been with the Times Co. for 32 years.

2. I submit this declaration in support of Appellees' motion for a stay of this Court's mandate pending filing of a petition for certiorari with the U.S. Supreme Court.

The New York Times

3. The Times Co. publishes, on a daily basis, the well-known and widely-read newspaper *The New York Times*, which provides extensive daily coverage of political,

financial, cultural, social, sporting and other events, both nationally and internationally. For over one hundred years its policy has been to publish "All the News That's Fit to Print."

4. The completeness of each edition of *The New York Times* gives it value beyond the day on which it is printed. Because of its widely-recognized comprehensive nature, *The New York Times* is valuable to researchers and scholars for historical purposes, who rely on *The New York Times*' reputation for recording daily events since before the beginning of the last century.

5. Because of its completeness and accuracy, *The New York Times* often is described as "the paper of record." *The Los Angeles Times* (which has no business relationship to *The New York Times*) has described it as "a unique institution . . . in its standing as the country's most highly respected, general interest 'paper of record'." David Shaw, *New York Times Moves from Distrust to Detente*, Los Angeles Times, March 31, 1998.

Preservation of The New York Times in Non-Paper Formats

6. For many years, complete issues of *The New York Times* have been reproduced and distributed on microfilm, microfiche and CD-ROM, as well as in the NEXIS computerized library of periodicals.

7. Since approximately July 1983, *The New York Times* has been available in the NEXIS computerized library of periodicals, which contains each daily issue since approximately June 1980.

Declaration of Alan Greengrass

8. Since approximately April 1992, *The New York Times* has been available on the New York Times OnDisc ("NYTO") CD-ROM product manufactured and distributed by University Microfilms International ("UMI"), which contains each daily issue since approximately January 1981.

9. Since approximately August 1990, *The New York Times Magazine* and *The New York Times Book Review* have been available on the General Periodicals OnDisc ("GPO") CD-ROM product manufactured and distributed by UMI, which contains each weekly issue since approximately January 1988.

Harm to The New York Times

10. As part of their prayer for relief in this case, Appellants have asked for an injunction that would prevent the Times Co. "from in any way copying, making a derivative work from, distributing, broadcasting, communicating or transmitting electronic copies of or otherwise electronically exploiting" Appellants' articles.

11. Appellant Tasini also has threatened to "shut down" NEXIS and "every database in the country," Felicity Barringer, *Freelancers Win Appeal in Copyright Suit*, The New York Times, Sept. 28, 1999, at C1, with a "tidal wave of lawsuits" on behalf of other freelance writers whose works also have been reproduced on NEXIS and CD-ROMs. Jason Williams, *Court Decision Could Leave Gaps in Archives*, Editor & Publisher Magazine, Oct. 2, 1999, at 5.

12. To reduce this risk, the *Times* would have to consider deleting from the electronic databases many other freelance

articles in addition to Appellants', because it would be impossible, as a practical matter, to identify, locate and negotiate with all freelance writers whose works have appeared in *The New York Times* since 1980, the date of the first *Times* NEXIS edition. The number of works lost through this process could number in the thousands or tens of thousands.

13. If neither the CD-ROM products nor NEXIS contained the complete text of *The New York Times*, these holes in the historical record would prevent *The New York Times* from containing "All the News that's Fit to Print" or constituting "the paper of record" in these electronic media. The only complete historical archive of *The New York Times* would be print editions and facsimile copies in microfilm and microfiche. The loss of customer confidence in the completeness of the electronic editions of *The New York Times* would have inevitable and incalculable effects on the future ability of the Times Co. to market electronic archives containing *The New York Times* to schools, libraries and other research facilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York on April 11, 2000.

s/ Alan Greengrass
Alan Greengrass

REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION (H. JUDICIARY COMM. PRINT 1961), pp. ix-xi, 85-88

HOUSE COMMITTEE PRINT

87th Congress
1st Session

COPYRIGHT LAW REVISION

REPORT
OF THE
REGISTER OF COPYRIGHTS
ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW

JULY 1961

* * *

Printed for the use of the House Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1961

* * *

[ix] PREFACE

BASIS FOR THIS REPORT

In 1955 Congress authorized the Copyright Office to undertake a program of studies leading to general revision of the U.S. copyright law. Thirty-four studies, covering most of the problems to be considered in drafting a new statute, have been completed and circulated to an advisory panel and other interested persons. On the basis of the studies, and the comments that have been received on them, the Copyright Office has analyzed the problems and has developed some tentative recommendations for their solution.

This report is a summary of our analysis and preliminary conclusions. Although it represents our best thinking at the present time, it is not intended as the final word on any particular problem or on the revision program as a whole. Our purpose in issuing this report is to pinpoint the issues and to stimulate public discussion, so that the widest possible agreement can be reached on the principles to be incorporated in a revised statute.

We hope that this report will reach all persons and groups concerned with copyright, that they will review it carefully, and that they will forward their detailed comments and suggestions to the Copyright Office. Their views in support of or opposition to our tentative recommendations will be given serious consideration in the next step in the general revision program — the drafting of a bill for introduction in the Congress.

Copyright Law Revision, Part 1

NEED FOR REVISION

The U.S. copyright statute, first enacted in 1790, has gone through three general revisions — in 1831, 1870, and 1909. The act of 1909, though since amended in some details, is still essentially the law today.

It seems unnecessary to dwell at length upon the changes in technology during the last half century that have affected the operation of the copyright law. Commercial radio and television were unknown in 1909. Motion pictures and sound recordings were in a rudimentary stage. New techniques for reproducing printed matter and recorded sounds have since come into use. These and other technical advances have brought in new industries and new methods for the reproduction and dissemination of the literary, musical, pictorial, and artistic works that comprise the subject matter of copyright. And the business relations between creators and users of copyright materials have evolved into new patterns.

A large body of judicial interpretation and business practice has grown up around the present statute. This has done much to adapt [x] the law to changing conditions, but its adaptability is limited. In many respects, the statute is uncertain, inconsistent, or inadequate in its application to present-day conditions. A general reexamination and revision have been urged on all sides.

Copyright Law Revision, Part 1

PAST REVISION EFFORTS[1]

Between 1924 and 1940 strong and continuous efforts were made to revise the act of 1909. A number of revision bills were introduced, and extended hearings were held by the congressional committees. The proposed revisions were designed mainly to conform our law with the Berne Convention, which was then the only international copyright convention of worldwide scope. Major changes in the U.S. law would have been required for this purpose. At the same time many persons were dissatisfied with the domestic impact of the 1909 statute, and most of the bills proposed broader changes than those required to join the Berne Union.

One revision bill was passed by the House in 1931, and a completely different bill passed the Senate in 1935. In the end, however, all these efforts bogged down in controversy among the various private interests, particularly over the fundamental differences between the Berne Convention and the U.S. law.

The legislative efforts aimed at U.S. membership in the Berne Union were abandoned after 1940. Instead, after the war, the United States participated in the development of a new worldwide convention — the Universal Copyright Convention — which was basically consistent with the U.S. law. In 1954 the statute was amended in the relatively minor respects necessary to conform it with the Universal Copyright Convention, and the United States became a party to the U.C.C. when the Convention came into force in 1955.

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1. See "Copyright Law Revision Study No. 1" (Senate committee print).

Copyright Law Revision, Part 1

PRESENT REVISION PROGRAM

Copyright Office studies. — The movement for general revision, which had been suspended during the development of the Universal Copyright Convention, was revived in 1955. In the legislative appropriation acts for the next 3 years, Congress provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for general revision.

The studies were designed to present, as objectively as possible, the history and provisions of the present law, the problems it raises, past proposals for revision, comparable provisions in foreign laws and international conventions, and an analysis of the issues and alternative solutions. Most of the studies were prepared by the Copyright Office staff; a few were written by impartial specialists outside of the Office.

In carrying out this program the Copyright Office has been assisted by a General Revision Panel of 29 copyright specialists appointed by the Librarian of Congress. The Panel was chosen to include persons familiar with the problems and operations of the various groups concerned with copyright. A preliminary draft of each study was sent to the members of the Panel for review, and was then revised in the light of their comments. The members were also asked [xi] to submit their views on the substantive issues, and these were appended to the studies. The studies were then made available to the public, and all interested persons were invited to submit their comments and views.

The 34 studies have been printed in a series of committee prints by the Subcommittee on Patents, Trademarks, and

Copyrights of the Senate Committee on the Judiciary. A list of the studies is given in appendix A to this report.

The present report. — This report is the result of many months of concentrated work by a number of people in the Copyright Office. Starting with the research and analysis contained in the studies and the views expressed by the Panel members and others, an advisory group of the Copyright Office staff reviewed and debated the various alternative solutions in detail, and eventually reached tentative conclusions. The members of the General Revision Panel have not participated in the preparation of this report. Although a preliminary draft of the report was circulated to the Panel members for their comments, it cannot speak for them in general or on any specific point. The opinions and recommendations on the following pages represent my present thinking and that of the staff of the Copyright Office.

In arriving at our recommendations we have given consideration to all the views expressed on a particular problem. In the copyright law, however, few problems can be dealt with in isolation. A change in one provision will often require the adjustment of others, and many of our recommendations are closely interrelated.

Moreover, various private groups concerned with copyright have conflicting interests that impel them to differ sharply on some of the major issues.[2] The needs of all groups

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2. For a listing of various industries concerned with copyright materials, and an estimate of their economic importance, see "Copyright Law Revision Study No. 2" (Senate committee print).

must be taken into account. But these needs must also be weighed in the light of the paramount public interest.

We have tried to find practical solutions that will afford a balance between the various private interests and at the same time safeguard the welfare of the public. No one knows better than we the difficulty of accomplishing this result. We nevertheless believe that, taken as a whole, a revision program along the lines of our basic recommendations would represent a significant improvement in the copyright law and would benefit all concerned.

This report, and the studies that led up to it, are a testimonial to Arthur Fisher. The former Register of Copyrights, who died on November 12, 1960, had planned and organized the entire general revision program, of which the studies and report are a part. Their ultimate purpose — the enactment of a new and better copyright law — was the goal of Mr. Fisher's career, and its accomplishment will be a tribute to his vision and energy.

ABRAHAM L. KAMINSTEIN,
Register of Copyrights.
Copyright Office, The Library of Congress.

[85] CHAPTER VIII

OWNERSHIP OF COPYRIGHT

A. THE PRESENT LAW

The present statute (sec. 9) gives the right to secure copyright to "the author or proprietor * * * or his executors, administrators, or assigns." In the case of a "work made for hire," the employer is deemed to be the author (sec. 26).

Under the common law, the author has literary property rights in his work upon its creation. He may assign his common law rights to another person or, if he dies owning them, they will pass on to his legatees or heirs. The owner of the common law rights is the person entitled to secure copyright under the statute.

The owner of a statutory copyright may assign it to another person (sec. 28). When the owner dies, the copyright will pass on to the legatees under his will (sec. 28) or to his heirs under the State laws of intestate succession.

We have discussed above (ch. V, pt. D3) the special provision in section 24 giving the renewal rights to the author or specified heirs.

B. INITIAL OWNERSHIP

1. IN GENERAL

The right to secure statutory copyright is vested initially in the author, and any other claimant must acquire the right

from him. This basic rule, however, is subject to two qualifications:

(*a*) In the case of a work produced "for hire," the employer has the right to secure copyright (sec. 26).

(*b*) In the case of a composite or collective work — such as a periodical or encyclopedia — the publisher has the right to secure copyright. The reference in section 9 to the "proprietor" as a person entitled to secure copyright was apparently intended to cover this situation.

2. WORKS MADE FOR HIRE[1]

a. Ownership of rights

The rule has long been established, both under the common law and under the statute, that the rights in a work produced by an employee in the course of his employment are vested in the employer. This rule has been based on several grounds: (1) the work is produced on behalf of the employer and under his direction; (2) the employee is paid for the work; and (3) the employer, since he pays all the costs and bears all the risks of loss, should reap any gain.

[86] Some commentators have urged that this rule be changed for the benefit of employee-authors. They propose

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1. See "Copyright Law Revision Study No. 14" (Senate committee print).

that the employer be given the exclusive right to use the work in his regular business activities, but that the employee should have the rights in other noncompetitive uses. To illustrate how this proposal would work:

- In the case of a story written for a magazine publisher by an employee, the publisher would have the exclusive right to publish the story in any periodical; but the employee would have the exclusive right to use the story in a book, motion picture, broadcast, or any other medium not competitive with the magazine.

- In the case of a script written for a motion picture company by an employee, the company would have the exclusive right to use the script in a motion picture: but the employee would have the exclusive right to publish it in a book or magazine. The employee's right to use the script for a stage or television play would depend upon whether, in the p??? situation, that use would compete with the motion picture.

We believe that in some situations there is considerable merit in the argument that an employee-author should share in any commercial value his work may have beyond its use in the employer's business. But we see many practical difficulties in the proposal to divide the rights between employers and employees by a statutory formula:

- Controversial issues would frequently arise as to the scope of the employer's business, and as to the degree

of competition between his business and particular uses of the work. No definite rules could be laid down to resolve these issues in the great variety of situations involved.

- The proposal would be unworkable in the common situation where a work is the composite product of many employees.

- It would often be difficult for potential users to know whom to deal with.

It is more practical, we believe, to continue the present rule that all rights vest in the employer. Where employees are in a position to do so, they may bargain — as some have done — for a share of the revenue derived by the employer from subsidiary uses of the work. Most employees are not in this position, but they would probably gain little or nothing from having rights which their employers could require them to assign. In any event, we do not believe that the great variety of situations involved — in which the employment relations, the nature of the works, and their potential uses differ widely — can be fitted into a general statutory formula for the division of rights.

b. Form of statutory provision

(1) *Scope of "works made for hire."* — The phrase used in the present statute — "works made for hire" — has been criticized as being inexact, because it might be thought to include works made on special commission. The courts, however, have not generally regarded commissioned works as "made for hire."

It has also been suggested that the statutory language should reflect the holding of the courts that an employee owns the right in a work created on his own initiative outside the scope of his employment.

[87] Instead of the phrase "works made for hire," it was proposed in previous revision bills to substitute "works created by an employee within the regular scope of his employment." We would adopt this more precise language as a definition of "works made for hire."

(2) *Designation of employer as "author."* — The present provision (sec. 26) defining "author" as including "an employer in the case of works made for hire" has also been criticized on the ground that the employer is not in fact the author and should not be designated as such. It has been suggested that the statute, instead of indicating that the employer is the author, should merely provide that the right to secure copyright vests in the employer. We would adopt this suggestion.

3. COMPOSITE WORKS

a. Ownership of the work as a whole

In the case of a composite work — such as a periodical, encyclopedia, dictionary, or symposium — authorship of the work as a whole consists of compilation and editing. Ordinarily, this work is done by employees of the publisher, and the publisher secures the copyright.

The reference in section 9 to the "proprietor" — in addition to "the author * * * or * * * his assigns" — as a

person entitled to secure copyright was inserted at the request of publishers of composite works. That reference, however, is cryptic and confusing. The publisher of a composite work acquires the right to secure copyright either as the employer or the assignee of the author. The additional category of "proprietor" as a person entitled to secure copyright is unnecessary. We propose that it be deleted.

b. Ownership of component parts

When the component parts of a composite work are created by the publisher's employees, the publisher acquires the rights in each part as employer. But when the component parts are contributed by independent authors, each author is the initial owner of his contribution, and the publisher must acquire his rights by assignment.

A contribution to a composite work may be copyrighted separately in the name of the author, by placing a separate copyright notice on the contribution. But this is not usually done. The common practice is to place a single notice on the composite work in the name of the publisher. We have recommended above (ch. VI, pts. C 4 and D 5) that the single notice should be deemed to cover all the component parts for which no separate notice is given. Accordingly, the publisher named in the notice should be considered the copyright owner of all the component parts not bearing a separate notice.

However, the author of a contribution may not have assigned all of his rights to the publisher. And in some cases there is no express agreement between them as to the

assignment of rights. We propose that the rights not assigned should be held by the publisher in trust for the author. And in the absence of any express agreement, only the right to publish the contribution in a composite work like that of the publisher should be deemed to have been assigned.

[88] 4. RECOMMENDATIONS

The statute should provide that copyright may be secured by the author or his representatives, successors, or assigns, except that —

(*a*) In the case of a work made for hire (defined as a work created for an employer by an employee within the regular scope of his employment), the employer should have the right to secure copyright.

(*b*) In the case of a periodical, encyclopedia, or other composite work containing the contributions of a number of authors, the publisher should have the right to secure copyright. The copyright secured by the publisher in the composite work as a whole should cover all of the contributions not separately copyrighted; but the publisher should be deemed to hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work and any other rights expressly assigned.

C. Co-ownership[2]

1. IN GENERAL

There are a number of situations in which two or more persons may become co-owners of the same rights in the same work:

- When two or more authors create a work in collaboration, they are usually co-owners of the rights in the first instance;
- When an author transfers to another person an undivided share of his rights, he and his transferee become co-owners;
- When an author transfers all his rights to two or more persons, they become co-owners;
- When a deceased author has two or more heirs, they may succeed to his rights as co-owners;
- Under the present law, when there are several persons in the class entitled to claim a renewal copyright, they take the renewal as co-owners.

Co-ownership must be distinguished from "divisibility," the concept discussed later in this chapter. "Divisibility" concerns the ownership by different persons of different

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2. See "Copyright Law Revision No. 12" (Senate committee print).

rights in a work, while co-ownership means that two or more persons together own the same rights.

2. RIGHTS OF CO-OWNERS

The present statute is silent as to the rights of co-owners among themselves and in relation to third persons. The courts have dealt with these questions by adapting the established rules pertaining to the co-ownership of other forms of property by tenants in common. Under the court decisions, any one of the several co-owners of a copyright may use the work or license a third person to use it without the consent of the other owners, but ha must share the profits with them.

One co-owner can, of course, assign his interest to a third person who would then become a co-owner in his stead. But since any . . . .

* * * *

DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 2 (H. JUDICIARY COMM. PRINT 1963), pp. vii, 109, 143-144, 151-153, 380, 385, 387

HOUSE COMMITTEE PRINT

88th Congress
1st Session

COPYRIGHT LAW REVISION
Part 2

DISCUSSION AND COMMENTS ON
REPORT
OF THE
REGISTER OF COPYRIGHTS
ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW

FEBRUARY 1963

Printed for the use of the House Committee on the Judiciary

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[109] TRANSCRIPT OF MEETING ON GENERAL REVISION OF THE U.S. COPYRIGHT LAW

LIBRARY OF CONGRESS,
Washington, D.C., Wednesday, January 24, 1962.

Present:

Abraham L. Kaminstein, chairman.
Julian T. Abeles, Music Publishers' Protective Association, Inc.
Richard B. Bilder, Department of State.
Thomas C. Brennan, Senate Judiciary Committee.
George D. Cary, Copyright Office.
Walter J. Derenberg, U.S. Copyright Society.
Sidney A. Diamond, London Records.
Joseph S. Dubin, Universal Pictures Co., Inc.
Simon R. Epstein, Government Printing Office.

Robert W. Frase, American Book Publishers Council.
George E. Frost.
Herb Fuchs, House Judiciary Committee.
H.L. Godfrey, Department of Justice.
A.A. Goldman, Copyright Office.
A.H. Helvestine, Department of Defense.
Irwin Karp, Authors League of America.
Bernard Korman, ASCAP.
Waldo G. Leland, American Council of Learned Societies.
George E. Long, Bureau of Customs.
Horace S. Manges, American Book Publishers Council.
Isabelle Marks, Decca Records.
Joseph A. McDonald; Smith, Hennessey & McDonald.
Frank G. Naughten, National Science Foundation.
Harry R. Olsson, Jr., National Broadcasting Corp.
John R. Peterson, cochairman, Committee on Program for Revision of the Copyright Law, American Bar Association.
Mrs. Harriet Pilpel.
Barbara A. Ringer, Copyright Office.
Rutherford D. Rogers, Library of Congress.
Edward A. Sargoy, Committee on Program for Revision of the Copyright Law, American Bar Association.
Adolph Schimel, Universal Pictures Co., Inc.
Sidney Schreiber, Motion Picture Association of America.
John Schulman, chairman of the American Patent Law Association Committee on Copyright.
Paul J. Sherman, Music Corp. of America.
Eugene J. Skora, U.S. Information Agency.
Gerald S. Stephenson, Department of Commerce.

Samuel W. Tannenbaum, chairman of the Copyright Division, Section of Patent, Trademark, and Copyright Law, American, Bar Association.

Emmett E. Tucker, Jr.; Hanson, Hanson & Cobb.

G.L. Ware, Department of Treasury.

Philip B. Wattenberg.

Harvey J. Winter, Department of State.

* * *

[143] Miss RINGER.

[144] I think that there are really six principal problems dealt with in the chapter: First, works made for hire; second, the question of ownership of material appearing in composite works (we've already touched on that this morning in the context of notice); third, the group of problems involving co-ownership and joint authorship of works; fourth, the question of divisibility of copyright; and fifth, problems involving the requirements for execution and recordation of assignments and other transfers.

There is a sixth problem, a very important one, which has come to be called the 20-year limitation on assignments, but this was discussed at the last meeting in the context of duration and renewal, and we do not plan to cover it again this afternoon.

To summarize the recommendations in the report very briefly:

First, with respect to works made for hire, I think the report in essence recommends that the present law be retained. Under the present law, as you are very well aware, the employer

has the right to secure copyright. The report recommends a somewhat more specific definition of what is a "work made for hire," but other than that would leave the present law undisturbed.

Second, with respect to composite works and the rights in the various contributions to them — of course, the term "composite works" includes periodicals and the whole area of collective works; we're just using that term for convenience — the report recommends that the publisher should have the right to secure copyright in the work as a whole. Bear in mind, this is leaving aside the entire question of notice. This involves ownership only. With respect to the ownership of contributions to composite works, the report recommends that this very nebulous question be clarified, and that the publisher would be deemed, and I am quoting —

> to hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work, and any other rights expressly assigned.

Third, with respect to coownership the report recommends leaving the present law, as it has developed over the years in the courts' decisions, essentially unchanged, and I won't review what that law is. But, in the area of joint authorship, the report takes the position that the courts, particularly in the "*Twelfth Street Rag*" and "*Melancholy Baby*" cases, have gone too far, and it would redefine the concept of joint authorship. It would define that concept as —

> a work created initially by two or more authors with the object of integrating their contributions into a single work.

Fourth, the report recommends that the statute specifically recognize the principle of divisibility of copyright. And what this would mean, among other things, would be that the various rights under a copyright could each be assigned separately and also that, with certain procedural safeguards, the assignee of a particular right could sue for infringement in his own name, without having to join his assignor.

And fifth, the report contains a number of recommendations with respect to the formal requirements for the execution and recordation of transfers. I won't go into these in detail, but I will mention what I consider probably the most significant:

* * *

[151] Mr. OLSSON. Sometimes, Paul, I can cure it. I agree, sometimes I can. But I don't want to be confined to using works where I can do it by curing it in a contractual way. I want to be free to bring the public all possible works I can bring them, and not only the ones where I can do it safely.

Mr. KAMINSTEIN. Well, I think we ought drop this at this point.

Mr. OLSSON. B won't always give me a license. In other words, I can't go to B.

Mr. KORMAN. There's no problem.

Mr. KAMINSTEIN. Well, I'm sure there is a problem — for someone.

Mr. KORMAN. Is he thinking about this work outside of a motion picture film, or is he just concerned with it when it's —

Mr. OLSSON. Well, what I'm suggesting is that perhaps the test ought not to be —

Mr. KORMAN. If he could get this work cleared by ASCAP, for example — to take the case he gave — and if we specifically clear a work for him, he has nothing to worry about.

Mr. OLSSON. I'm suggesting —

Mr. KAMINSTEIN. Harry, I would welcome an opportunity to see in writing how this would affect you under the present rule and under the rule we propose. And I think, until you get that sort of thing in front of you, we may be arguing about particular situations rather than the general rule.

Mr. OLSSON. Well, I've been misunderstood so much, may I say one thing to clarify what it is that I'm concerned with here. I think perhaps the test of whether you have a joint work should depend on an examination of the work itself, rather than by reference to the motives of the people who wrote the contributions to the work originally —

Mr. KAMINSTEIN. I think we got that point. Mrs. Pilpel.

Mrs. PILPEL. I have a similar comment to make with reference to a similarly well-intentioned suggestion in this part of the report — unless I also misunderstand the report. And that appears at the bottom of page 87, where the report states that, in the absence of any express agreement, only the right to publish a contribution in a composite work like that of the publisher should be deemed to have been assigned.

Now, I think this was an attempt on the part of the reporter to make a favorable rule for the original creator of the contribution to the composite work. But, as I see it, it is less favorable than the present law — unless I'm mistaken about the present law. I think the present law would leave the question wide open. In other words, it is a question under present law of the intent of the parties. And the author could argue, in the absence of an express agreement, that all he gave to the publisher was the right to include his contribution in that particular composite work. There is no presumption that he gave anything more than that. And indeed, in my experience, most authors do not intend to give any more than that, except when the buyer says, "We are buying all rights, or these rights."

But we're talking of a situation where you don't have an express agreement. By putting this provision in the report, I think you are putting the author in a worse position than he is under present law, [152] since he could not thereafter ever grant an exclusive — and, indeed, may not ever be able to grant a right to include that work in a composite work, since it would be deemed that he had assigned that particular right to the purchaser of the first right to include it in a composite work. Therefore I would oppose that provision.

Mr. KAMINSTEIN. Well, I would certainly welcome additional comment on this, since this was originally designed to protect the author.

Mrs. PILPEL. I know.

Mr. SCHULMAN. In that connection, I'd like to suggest something which may run through a number of recommendations in the report. The law as recommended would lay down hard and fast rules whereby, if such a thing happens, the consequence flows as follows. I think I suggested in one of my comments that we look at this report and the copyright law in the light of the sales acts which have been enacted, and the Negotiable Instruments Act, which do not lay down hard and fast consequences but create presumptions. In other words, if certain things happen, a presumption follows that the stated conclusion will result. And if you examine the sales acts particularly, as well as the Negotiable Instruments Act, you'll find that they are not inevitable consequences; they are merely rebuttable presumptions.

I raise that in connection with works made for hire, as to who is to own the copyright. You might say that if there's a service contract there is to be a presumption. But to require, as a matter of law, that an employee's work be considered that of the employer to me seems carrying the law beyond the necessities, and carrying the law beyond the intention of the parties. You may have all sorts of consequences flow from employment contracts, from engagements, and so forth, but each party should be entitled to provide his own

consequences, so that things follow only if there is an absence of a different intention of the parties.

And as to what Harriet said, and the same with what Harry Olson was arguing, I think we'd find less opposition or less lack of ease about some of these proposals if they were put in the form of presumptions. In other words, if nothing else is said, the presumption would follow in the absence of an agreement to the contrary. That, of course, is one of my objections to the *Pushman* case. It laid down the rule of the transfer of copyright as a matter of law, not as a matter of presumption. And I think that if we thought in those terms, that certain presumptions are created from certain transactions but that they are nevertheless rebuttable presumptions, I think we'd find greater agreement on some of these protective provisions.

Mr. KAMINSTEIN. Mr. Karp, do you agree with Mrs. Pilpel on this?

Mr. KARP. Yes, I do; and I think that it would simplify matters from the point of view of the author, the publisher, and anybody who is taking rights from the publisher, if the line of presumption were made clear. In other words, I see no objection to saying that, where a short story is published in a magazine, it should be presumed that the publisher has acquired only the first serial right, or first magazine right, or whatever you call it — the right to publish in that edition — and that, in the absence of a specific assignment of other rights by the author in writing, recorded, no one would be free to presume that the publisher owned anything else, and would have to deal with the author.

[153] If the publisher wanted more, and the author were willing to give more, then they would do it by means of a specific assignment of other rights, which the publisher would then have available to record and to show to anybody who was going to deal with him with respect to these other rights. And I think the same should hold true in the case of a composite work.

Mr. DIAMOND. I would just like to note my general agreement with what Irwin Karp and Harriet Pilpel said about this, and to point out that I think the whole difficulty in this particular recommendation is the reference to a "similar composite work." Perhaps the basic intention really wasn't quite that, but was meant to apply to "that particular composite work." I think practically everybody would agree, then, that that was a desirable rule.

Mr. SCHIMEL. Mr. Kaminstein, if this point is finished, I'd like to address myself to something else.

Mr. MANGES. On this point —

Mr. KAMINSTEIN. Just a moment, then. Mr. Manges.

Mr. MANGES. I'm not clear what happens if there is a revised edition of the composite work and some of the selections are omitted. Is that a composite work like that of the publisher, as referred to?

Mr. KARP. No, I would assume not. But you protect yourself by adding to your voluminous contract another clause which says —

the publisher shall have the right to publish revised editions of this composite work, eliminating some of the contributions.

Mr. KAMINSTEIN. Mr. Schimel.

Mr. SCHIMEL. I should like to address myself to the proposal contained on the top of page 87, that instead of indicating that the employer is the author, it should merely provide that the right to secure copyright vests in the employer. I think that the producers of motion pictures would be very much prejudiced because certain rights are said to flow to an author — particularly in foreign countries, which would vest in others than the employer unless the employer were designated as the author.

Now, the number of contributors to a motion picture are many, and in foreign countries, particularly, there may be rights created in authors which would not vest in the corporate owner. And I think that, for purposes of the protection of the motion-picture producer who creates a composite work through the endeavors of a number of contributors, he should be the author if he is the employer for hire.

Mr. KAMINSTEIN. Mr. Schulman.

Mr. SCHULMAN. I am going to speak on this and then keep quiet for awhile. But this question of authorship for hire has always bothered me, I can't see how one can transfer authorship, as such, from a living person to a corporation.

I can see how one can provide that an employer shall have certain rights in the absence of an agreement to the

contrary. It should be possible for me to make an agreement with a motion-picture company to produce some literary work, and still reserve title to myself, if the motion-picture company is willing to make such a contract. Now, the difficulty with the concept of a work made for hire is, it doesn't allow the very leeway of which I spoke before. It should be possible for me to make a contract and say, "Even though I am employed, and you pay me X dollars a week, nevertheless I want to own title to . . . .

* * *

[380] HARRIET F. PILPEL AND MORTON DAVID GOLDBERG

May 22, 1961.

We (that is, Harriet F. Pilpel and Morton David Goldberg) have read with great interest the tentative draft of your recommendations to Congress on the general revision of the copyright law. It is a remarkably good job (not unexpected, considering the caliber of the people who prepared it), and there are only a few points on which we have any significant disagreement — most notably, your recommendation that the system of separate terms of original and renewal copyright be continued.

Accordingly, our comments should be read as supporting in essence all the recommendations which you have made, except those as to which we have noted specific disagreement. We have also made comments on specific highlights of your recommendations with which we want to accentuate our agreement (notably, for example, your recommendation that the manufacturing clause be abolished).

Copyright Law Revision, Part 2

For ease in reference, we have keyed our comments to the chapter outline and tentative page numbering in the draft.

CHAPTER II — COPYRIGHTABLE WORKS

B. Specification of classes of copyrightable works

You suggest here that the extension of the copyright statute to new areas should be left to consideration and determination by Congress. In our opinion, however, the *Capitol Records* case illustrated not only the ambiguity of the scope of copyrightable works under the present . . . .

* * *

[385] copyright is secured. Accordingly, in the absence of a written agreement to the contrary the actual creator of a work, and not his employer, should be deemed the copyright proprietor. Such an approach, to our view, would result in the maximum reward to creative efforts, and consequently the greatest stimulation of such efforts and benefit to society.

3. *Composite works*. — We strongly support your recommendation that in the absence of any express agreement, only the right to publish the contribution in a composite work like that of the publisher should be deemed to have been assigned. The adoption of this recommendation would eliminate great inequities in the magazine field, where writers and photographers frequently cede subsidiary rights to the publisher inadvertently, which would not be the case if the publisher were required to make an express agreement to obtain such rights.

D. Transfer of rights

3. Protection of authors against unfair transfers — We support the concept of a time limit on transfers that do not provide for continuing royalties, and agree that a period of 20 years would probably be ample time in most cases for a lump-sum transferee equitably to complete his exploitation. Our only objection here would be that unless the statute is made very specific, the concept can be defeated by a contract which provides for only a nominal continuing royalty.

CHAPTER X — INTERNATIONAL ASPECTS OF COPYRIGHT

A. Works of foreign authors

We support your recommendation that copyright protection be extended to foreign works generally, without requiring reciprocity or national treatment. Not only would such extension eliminate some of the complexity of the copyright law, but also anything we can do to enhance our international relations — in the area of copyright or any other area — would be helpful at this time.

A slight modification of your proposal, however, might be suggested: perhaps Congress should give the authority to the President to grant this blanket copyright protection to specific nations as he sees fit. If the President then, for example, made a specific grant of protection to each individual member of the United Nations, this would perhaps be more impressive than merely a nonspecific congressional enactment. Also, we would assume that our desire for the

fullest American access to Soviet scientific publications would make it advisable not to extend such protection to the Soviet Union. If this be the case, the mere absence of any specific extension of positive protection to the Soviet Union might be more politic than a negative Presidential decree specifically denying such protection to that country.

B. Manufacturing and related provisions

Amen. The manufacturing clause is perhaps rivaled only by the system of renewal copyright in the needless trouble and complication which it inflicts on not only the legal practitioner but the creators and users of copyrighted works. Photographers especially bear the brunt of this provision, in view of the excessive domestic costs which make . . . .

* * *

[387] The above comments are a reaction to the general recommendations made in the tentative draft, and we would hope to be of further assistance in commenting on the specific language of the statute to be proposed to Congress. Also, of course, these comments are necessarily abbreviated in view of the fact that time does not permit more detailed discussion.

Kindest regards.
Sincerely,

HARRIET F. PILPEL
MORTON DAVID GOLDBERG.

* * * *

PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT, 88TH CONG., 2d SESS., COPYRIGHT LAW REVISION, PART 3 (H. JUDICIARY COMM. PRINT 1964), pp. 15, 255-261, 266-267, 418-419

COPYRIGHT LAW REVISION

Part 3

PRELIMINARY DRAFT FOR REVISED
U.S. COPYRIGHT LAW

AND

DISCUSSIONS AND COMMENTS
ON THE DRAFT

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1964

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[15] § 14. OWNERSHIP OF COPYRIGHT

(a) *Initial ownership.* Copyright in a work protected under this title shall vest initially in the author or authors of the work. The authors of a joint work[10] shall be considered co-owners of

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10. A "joint work" would be defined elsewhere as a work prepared by two or more authors in collaboration or with the intention that their contributions be merged into indistinguishable or interdependent parts of a unitary whole.

copyright in the work. Ownership of copyright may be transferred to the legal representatives, successors in title, or assigns of the author or authors.

(b) *Divisibility of copyright.* Any of the exclusive rights in a work may separately be transferred and owned. The owner or owners of any particular exclusive right under a copyright shall, to the extent of that right, be entitled to all of the protection and remedies provided in this title.

(c) *Works made for hire.* In the case of a work made for hire,[11] the employer shall, for purposes of this title, be considered the author and shall have all of the rights comprised in the copyright unless the parties have expressly agreed otherwise.

(d) *Contributions to collective works.* Copyright in each separate contribution to a collective work[12] shall be distinct from copyright in the collective work as a whole, and shall vest

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11. A "work made for hire" would be defined elsewhere as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission.

12. A "collective work" would be defined elsewhere as a work, such as a periodical issue or encyclopedia, combining the separate contributions of various authors into a collective whole.

initially in the author of the contribution. The owner of copyright in the collective work shall, in the absence of an express transfer of the copyright or of any exclusive rights under it, be presumed to have acquired only the privilege of publishing the contribution in that particular collective work.

§ 15. OWNERSHIP OF COPYRIGHT AS DISTINCT FROM OWNERSHIP OF MATERIAL OBJECT. Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object, in which the work is embodied. Transfer of ownership of any material object, including the original copy or record of the work, shall not of itself convey any exclusive rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, shall transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

SECTION 16: ALTERNATIVE A

§ 16. LIMITATIONS ON TRANSFERS OF COPYRIGHT OWNERSHIP

(a) In the case of any work other than a work made for hire, a transfer by the author after the effective date of this act, otherwise than by will, of copyright or of any exclusive right under a copyright . . . .

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Copyright Law Revision, Part 3

[255] TRANSCRIPT OF MEETING ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW:

DISCUSSIONS OF §§ 14-18

LIBRARY OF CONGRESS,
Washington, D.C., June 11, 1963.

Present:

Abraham L. Kaminstein, chairman.

Julian T. Abeles, Music Publishers, Protective Association, Inc.

Eugene N. Aleinikoff, National Educational Television and Radio Center.

Thomas C. Brennan, U.S. Senate Judiciary Committee.

Fulton Brylawski.

S. J. Buzzell.

Richard Colby, Motion Picture Association of America Copyright Committee.

Walter J. Derenberg, Copyright Society of the U.S.A.

Sidney A. Diamond, London Records, Inc.

Robert V. Evans, Columbia Broadcasting System, Inc.

John Farmakides, National Aeronautics and Space Administration.

William P. Fidler, American Association of University Professors.

Herman Finkelstein, American Society of Composers, Authors and Publishers.

Robert Frase, American Book Publishers Council.

H. L. Godfrey, Department of Justice.

Morton David Goldberg; Foster, Ginsberg & Schwab.

Abe A. Goldman, Copyright Office.
Charles F. Gosnell, American Library Association.
Laurence B. Heilprin, Council on Library Resources.
A. H. Helverstine, Department of Defense.
Theodore R. Jackson, Gilbert & Gilbert.
Irwin Karp, Authors League of America.
Sydney M. Kaye, Broadcast Music, Inc.
Leon Kellman, American Guild of Authors and Composers.
Peter H. Kennedy, Christian Science Church.
John M. Kernochan, Columbia University Law School.
Germaine Krettek, American Library Association.
William Lichtenwanger, Library of Congress.
Bella L. Linden, American Textbook Publishers Institute.

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Owen Love, National Education Association.
Horace S. Manges, Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute.
Spencer C. Olin, Walt Disney Productions.
Harry R. Olsson, Jr., American Broadcasting Company.
Harold Orenstein, Orenstein, Arrow & Lourie.
E. Gabriel Perle, Time, Inc.
John R. Peterson, American Bar Association.
Daniel J. Reed, Library of Congress.
Barbara A. Ringer, Copyright Office.
Saul N. Rittenber, MGM.
Thomas J. Robinson, Motion Picture Association of America.

Harry N. Rosenfield.
Myron Roth, National Broadcasting Company, Inc.
Edward A. Sargoy, American Bar Association.
Sidney Schreiber, Motion Picture Association of America.
John Schulman.
James A. Stabile, National Broadcasting Company, Inc.
William S. Strauss, Library of Congress.
Samuel W. Tannenbaum, Johnson & Tannenbaum.
Franklin Waldheim, Walt Disney Productions.
Alfred H. Wasserstrom.
Philip B. Wattenberg.
Nancy Wechsler, Greenbaum, Wolff & Ernst.
Michael W. Werth, Department of Justice.
John F. Whicher, Sargoy & Stein.
Leonard Zissu.

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KAMINSTEIN. Ladies and gentlemen, I have been asked to advise you that the Panel meetings have been opened to the members of the press. I am sure the reporters understand that we are discussing preliminary draft provisions and that, in order to promote a more fruitful exchange of viewpoints, it has been made clear that your remarks do not necessarily reflect or represent any formal or official position.

I should like to turn first to section 14, and call on Mr. Goldman, the General Counsel of the Copyright Office, to introduce that provision.

Copyright Law Revision, Part 3

GOLDMAN. Section 14 of the preliminary draft lays down basic principles regarding two subjects: the initial ownership of the exclusive rights, and the transferability of ownership. In subsection (a), the first sentence states the fundamental principle that copyright vests initially in the author or authors. The second sentence supplements that by stating the rule that in the case of a "joint work" — which would be defined elsewhere in the statute, as indicated near the bottom of the page in a footnote — the two or more authors would be co-owners initially. The third sentence states the fundamental prin-[257]ciple that ownership may be transferred from the author, to his legal representatives, successors, or assigns.

Subsection (b) states the general principle that copyright is divisible — that is, that any of the rights in the work can be transferred separately. The second sentence in (b) makes it explicit that, where the statute refers to the protection afforded the copyright owner or the remedies available to the copyright owner, then, with respect to any particular right that may have been transferred separately, the protection and the remedies are available to the owner of that particular right as the copyright owner.

Subsection (c) deals with the special case of works made for hire. It provides that, for the purposes of this title, in the case of a work made for hire — with a definition indicated again in a footnote at the bottom of the page — the employer shall be considered the author, with the result that the employer would have all of the rights unless the parties have expressly agreed otherwise.

Now subsection (c) departs in one or two respects from the recommendations in the Register's Report, and I want to point them out. The Report proposed that, instead of calling the employer for hire the author as the present law does, this "fiction," as the Report termed it, be dropped, and the provision read in substance that the employer would have all of the rights of the author, or that the employer would be the initial owner of copyright. The result actually would not be different, with respect to ownership, from saying that the employer would be considered the author. Representatives of the motion picture industry have urged very strongly that it is important for them to have the employer for hire denominated as the author. Subsection (c) now represents that point of view.

It also incorporates another suggestion — that the ownership of copyright by the employer for hire be, as some advocates put it, a presumption which would be subject to an agreement otherwise. The last clause in subsection (c) states that the parties may expressly agree otherwise with respect to ownership of the rights in a work made for hire.

Turning to the next page of the draft, subsection (d) of section 14 deals with the special case of ownership of contributions to a collective work. The first sentence states the principle that the copyright in a contribution is distinct from the copyright in the collective work as a whole, and that the usual principle that copyright ownership begins in the author applies to the contribution. That is, the author of the contribution is initially the owner of the rights in the contribution.

The second sentence deals specifically with the question of ownership as between the author of the contribution and the copyright owner — normally the publisher — of the collective work as a whole, in the absence of an express agreement between them. In the Report it was [258] recommended that, in this situation, the publisher of the collective work would be presumed to have the right to publish the contribution in his particular collective work, and in any similar collective work.

In the course of our previous discussions of that question, strong arguments were made that there should not be a presumption of transfer of ownership, in the absence of an express transfer, of the right to publish the contribution in a similar collective work. We have adopted that argument, and the second sentence provides now that, in the absence of an express transfer of the copyright or an express transfer of any particular exclusive right under it, it would be presumed that the copyright owner of the collective work would have acquired only the privilege of publishing the contribution in his particular collective work. The only other rights he would acquire would be any that were transferred to him expressly.

Let me call your attention to one other thing. We have not, anywhere in section 14 or the other sections presented today, made special provision for the ownership of copyright in a motion picture or in a sound recording. Just as under the present law, ownership of copyright in a motion picture is ordinarily determined by the rule governing works made for hire. So, for the present at least, the ownership of copyright in a sound recording would be left in the same situation as a motion picture. The question of ownership, insofar as any

provision has yet been proposed in this draft, would be governed by the rule pertaining to works made for hire.

ABELES. I really don't understand the purport of the provision that "Copyright in a work protected under this title shall vest initially in the author or authors of the work." When an author creates a work, he assigns it to a publisher, a motion picture producer, or whoever it might be. The assignee takes out the copyright, and it initially vests in the author. It is definitely illogical. When does it part company with the author?

Then it says "Ownership of copyright may be transferred to the legal representatives, successors in title, or assigns of the author or authors" — nobody else. In other words, according to this, the author would forever own the copyright, subject to the acquisition thereof from or through him. It could only be transferred to the legal representatives, successors in title or assigns of the author or authors. An author does not obtain the copyright, so how can it initially vest in the author, subject to disposition only from or through him? The one that the work is assigned to obtains the copyright; it belongs to that party, subject to that party's disposition thereof. The proposed provision would be a radical, illogical and impractical departure from existing procedure.

Now, later on, it says "A 'work made for hire' would be defined elsewhere as a work prepared by an employee within the scope of the duties [259] of his employment, but not including a work made on special order or commission." In other words, a motion picture company would employ a man,

and give him three months to write a script. That would be a work made on special order or commission, and therefore it would not be for hire. I just can't comprehend that.

MANGES. I would be strongly opposed to the proposed definition of works for hire, especially with respect to the last clause that Mr. Abeles just mentioned, where it says, "... but not including a work made on special order or commission." Today in book publishing, for example, probably a majority of the cases of works for hire involve works made on special order or commission. If there were any such definition here, you'd put a whole industry out of business — namely, the freelancers. Publishers would be discouraged completely from using any freelancer. There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors.

Now, I don't know anything wrong in the present system, where we don't have such a definition. I have heard no broad-scale complaint, and I don't understand the reason for this change, which is absolutely revolutionary.

With respect to the proposed definition in section 14(d), where examples are given of a collective work, one of the most obvious examples would be an anthology; it may be that it is so obvious that it isn't mentioned. On the other hand, its present absence seemed very puzzling to people who have been reading this footnote.

WASSERSTROM. I'd like to speak to the point raised by Mr. Abeles a moment ago, because it ties in with the other point that I wish to address myself to. I take it that, when you define "ownership" in section 14(a), the critical word would be "initially." I mean, you're not endeavoring to change the law. It's just a matter of tracing your rights to the author — that is the present posture of the law as I understand it — so that initially the ownership is in the author, the creator of the work.

But what puzzles me, and what I react adversely to in subsection (d), is that you emphasize this relationship again in respect to collective works. And I raise this question, which is a very serious one, at least to my clients as publishers of magazines: where do we go with regard to a work independently authored and making its first appearance in a periodical or in a magazine?

Now if you say, as you do, that initially the copyright is in the author and not in the publisher of the work as a whole, it seems to me that you're running counter to a well-established practice in the magazine publishing field — that copyright is initially secured in the name of the publisher. Between the parties — the author and the pub-[260]lisher—there may be arrangements as to rights; but, as far as third parties are concerned, initial copyright (in the absence of an agreement to the contrary) is generally secured, in my judgment and in consonance with my understanding and experience, in the name of the publisher of the periodical. Then the publisher will hold it in trust for the author with respect to all rights except those acquired by the magazine publisher. Are you endeavoring to change such established practice?

GOLDMAN. Would your concern be laid at rest, Mr. Wasserstrom, if what you stated with respect to subsection (a) were also the case with respect to subsection (d) — that is, a provision that copyright stems from the author, but that the publisher of the periodical, by agreement with the author and by transfer from the author, could secure whatever rights they contract for in the transfer?

WASSERSTROM. Well, I think that would go a long way toward clarifying my objection to the way subsection (d) is presently worded. But if you mean to emphasize an express transfer in regard to subsection (d), that is, the need for an express provision, then I think you are running counter to something that is well established in the magazine-publishing field.

I think such change could be hurtful to authors, as well as to publishers, because the present arrangement, as I understand it, protects authors sufficiently, even though there isn't an express transfer. There may be an implied one — implied in fact as the result of a well settled and known practice in that field whereby, although the right to copyright derives from the author, there is perforce logical priority in authorship, nonetheless the copyright is secured, in the first instance, in the name of the publisher. I wouldn't want to see that changed. I would be duty-bound to oppose a statutory provision that would require or promote such change.

GOLDMAN. But it is secured by the publisher by virtue of some kind of transfer from the author.

WASSERSTROM. Yes, either express or implied.

GOLDMAN. Now this says that, in the absence of any express agreement, it remains in the author. In effect it leaves wide open the question of who is the owner if there is an express transfer.

WASSERSTROM. Well, the word "express" in the phrase is what I object to: that work should, I submit, be deleted.

PETERSON. I would like to support Mr. Manges' point with respect to the definition of a "work made for hire." It seems to me that that should include a work made on a special order or commission too. I don't think there is any valid philosophical or economic difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job. And [261] as in the book publishing field many books are written on special order or commission, so in the field of publishing in many different languages. Often when you wish to publish in a particular language where you don't have much need for it, you bring in a translator or someone who works well in that language for that particular job or commission. You don't have enough work to keep him on the payroll all the time, yet that work essentially is "made for hire."

LINDEN. At this juncture I certainly wish to support Mr. Manges' and Mr. Peterson's positions with respect to the phrase ". . . but not including a work made on special order or commission" in the definition of "works made for hire." I concur that translations become a problem to the

publisher. All contributions to encyclopedias and reference works become problems. The long introductions that have become popular in the publishing field as introducing, both by way of background information and explanation, literary works in the public domain furnish another illustration of the kinds of works made for hire under the present system, and paid almost at all times by a lump sum payment, that would be excluded from subsection (c) of section 14. This should be particularly borne in mind when we examine Alternative A of section 16.

I also wish to comment with respect to subsection (d) of section 14. I note in the second sentence the phrase ". . . in that particular . . ." (I am emphasizing the word "particular") ". . . collective work." The addition of the word "particular" raises in my mind the question as to whether revisions of that collective work would be "that particular work" — whether a volume containing only half of the material in "that particular collective work" would therefore be excluded.

KARP. Mr. Kaminstein, as to Mr. Wasserstrom's comment on subsection (d), I think that the draft as written reflects and clarifies what is sound practice in the publishing field. Actually, the publisher takes copyright in individual contributions to collective works only because of a disinclination to put copyright notices on the bottom of the first page of each article or story. Every reputable publisher that I know of willingly reassigns to the author, immediately after publication of the periodical, all rights except first periodical or first serial rights. And as Mr. Goldman has pointed out (and I heartily agree with him) this certainly makes it easier to carry that practice forward into the law.

I really see no conflict between the position of the publisher and this section. They say the same thing, and this section would just make it a matter of record. It would avoid the necessity of assignments and carry out what is the agreement between most authors, publishers, and only an implied agreement. There are very few contracts between article- and story-writers and their publishers as to what's to happen. It is simply the practice of the trade that, when the magazine has published it reassigns all rights except first serial rights.

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[266] As for divisibility of copyright no one except myself seems upset about dividing a copyright into little pieces and then making each piece copyrightable. I think probably the reason for it is that we are all aware of the procedural and party problems that you get out of having indivisible copyright. Since we haven't had experience in this country with the kinds of problems that you get with divisible copyright, we have a tendency to think that everything is going to be fine when we change.

But I suggest that you are going to have the same party problems and procedural problems once you've got divisible copyright that you have had in the past with indivisible copyright. The only difference is that the burden is going to be shifted now from plaintiffs to defendants. And I suggest that it is unjust to shift that burden.

Plaintiffs have two remedies whereby they can avoid the procedural and party problems. First, when they deal with

one another they can provide in their contracts (as the motion picture people do quite consistently) that the proprietor of the copyright, the author generally, may be joined in any lawsuit by name and made to appear as a plaintiff in the action with the licensee, say, of exclusive motion picture rights. The whole problem can be solved in that way — in a contractual way. The plaintiffs also have another opportunity. The author, when he makes an assignment to somebody, can choose the person to whom he makes the assignment. He has at least the possibility of some choice in the matter.

Users, who are normally defendants in these law suits, cannot solve these problems by contract in the first place because they are not parties to these contracts. They appear merely as defendants. And, moreover, they don't choose the people among whom the rights are going to be split up.

It seems to me that all the rational arguments favor leaving the burdens where they now are — that is with the plaintiffs.

As for "works made for hire," I agree completely with Horace Manges as to the definition, that the phrase ". . . but not including a work made on special order or commission" should he dropped.

As for section 14(d), I am troubled only by the matter following the asterisk which defines a "collective work." It seems to me that the definition is so broad that it would include a motion picture. I wonder if that is intended.

KAMINSTEIN. I think many of you don't know Mr. Perle, who is Associate General Counsel of Time, Inc. Did you have your hand up, Mr. Perle?

PERLE. I would like to address myself to two things. First, in section 14(c), I not only subscribe to what I hope is the majority view as expressed by Mr. Jackson, Mr. Abeles, and so on, but I think that [267] it's of vital importance. In thinking about "works made for hire," I think one of the things that is overlooked where a work is made on commission or on special order is that, at least from a philosophical standpoint, that product would not be in existence were it not commissioned or ordered. You have the peculiar situation where this footnote would give broader rights to someone who has created something which wouldn't have been in existence were he not paid to create it, than the mere employee, who often has the luxury of being able to go off on his own frolic and detour.

I know in our own business we ask people to create very specific things — whether they be articles, stories, books, photographs, illustrations — merely as a supplement to an existing work, or what have you. We will ask these people to do it with the express intention that we will be the authors of that — that we will be the owners of that, not just for the immediate purpose of publication in a book or a magazine, but also for all other purposes. And the basic fact, I think, is one that should not be overlooked, that the work would never come into creation were it not ordered and commissioned.

Now this ties in, to an extent, with the rather interesting language in subsection (d). This is because, if you were to

accept the fact that someone who has performed work on special order or commission is the author and the owner, then the person who has commissioned it must be presumed to have acquired the right to publish it only in a given collective work, be it an encyclopedia or a magazine.

I'd also like to take exception to the word "exclusive" in the third from the last line, where we say, "The owner of the copyright, . . . in the absence of an express transfer of the copyright or of any exclusive rights under it. . . ." Now, it is possible that the publisher of a collective work will have broader or further rights without having exclusive rights. I think that, of course, would be negated if the person doing the work on commission or on special order were deemed for copyright purposes not to be the author, but rather the employer were deemed to be the author.

One other general point on that, if I may. Insofar as I've seen it, the whole term of "employee for hire" has thrown our comptrollers and accountants throughout the whole publishing industry into a tizzy. Where you get an outside entity and you ask them to create a work for hire, and it's the express intention of all the parties that that work product be the exclusive product of the commissioner or the orderer, their comptrollers and accountants start going into a real tailspin the minute they start seeing the word "employee," because this means social security, withholding, and all the other attendant mechanical housekeeping tasks. So perhaps we should not use the word "employer" at all, but rather "hirer."

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Copyright Law Revision, Part 3

[418] 6. *Section 7.*

I am strongly opposed to the whole concept of Section 7. All of us have heretofore secured copies of one, two or three pages, or, on occasion, perhaps an entire case as reported by West Publishing Co., without being charged with infringement. There can be no real control over such partial single copies when made by libraries, particularly since most of us are in a position to make such copies for our own use, either in our own offices or through the facilities of commercial photocopiers. The copying of an entire article, or an entire work falls into a different category.

If it were possible to limit the right to make copies to libraries of the traditional sort containing large collections of books in the traditional form, which libraries were not maintained by any profit-making institution; and if the right to make the copy were limited to works 10 years or more old, the publisher of which had gone out of business and the author of which could not be found after diligent search, there would probably be little harm. We must, however, deal with kinds of libraries as yet uninvented and a situation when a manuscript will be fed into a computer and ordered as needed: when, in fact, there will be no publishing industry as we now know it. Little need be said about the duplication of sound recordings: it is now so simple that an authorized library supplier could materially damage the phonograph record industry. It was not particularly brought out at the Panel Meeting, but it is clear that under the proposed Section 7, I could organize a phonograph record library, acquire one copy of every new recording and then offer to sell these to the public for 15 cents instead of 98 (the pressing cost is

now 9 to 10 cents, and I would have to pay no royalties, no distributors, etc.). A reasonable investigation would show many instances in which a particular recording is not available in a given city on a given day or even during a given week, and, in any case, the public cost of the recording would be 98 cents, which might be construed as excessive.

The main reason for the section appears to be facilitating exchange of scientific data, which we are told today involves an expenditure of some $5,000,000.00 a year. Expenditure on such scale, towards a total research expenditure of some $14,000,000,000.00 a year, does not make much of an equitable case for royalty-free copies. Yet everyone recognizes the need for rapid exchange of scientific information.

It would seem to me that this is a transitional problem. Once computer libraries come into existence, as they inevitably will, these libraries can themselves pay for every copy of a work transmitted. It is the assimilation of existing material and material produced during the transitional period that will cause difficulties. I would suggest that, with respect to such material, the libraries receiving [419] the request be required to transmit it to the publisher. If the publisher is unavailable or is unable to furnish a copy, perhaps the library might be given permission to make a copy upon condition that it remit to the publisher the retail price of the book. In other words, the cost of the library copy would be the retail price of the book plus the duplicating cost. In the case of articles, there ought to be remitted to the magazine publisher the price of the entire issue of the magazine.

I do not know whether this suggestion would be acceptable to the authors or publishers. It would not meet the well taken point that the continued existence of first edition copies would inhibit the issuance of further editions. It does meet the primary point that libraries should not be in a position to furnish copies at a price competitive with the publisher. The key to the proposal, however, is that the library ought to be under an obligation to contact the publisher or the manufacturer of the record and to offer to pay the price which the publisher or manufacturer charges for individual copies. Any right to make a copy of a whole work or article should not vest until, at the earliest, the publisher has notified the library that it is unable to furnish a copy. Under such a scheme the work can be made rapidly available if the person interested in acquiring it is willing to have the inquiry made by telegram.

As to partial copies, I think the law might be left as it is. The copying of a page, or two or three of a longer work is not, in my opinion, an infringement at present. Beyond that, the library proceeds at its own risk.

Sincerely yours,

GEORGE SHIFFER

GEORGE SHIFFER

April 16, 1963

The following are my comments concerning Draft Section 13. As I indicated at the Panel meeting, I consider it

essential to treat equally the users and suppliers of all reception equipment used to receive ordinary commercial broadcasts. The problem being complex, I have taken the liberty of describing the context at some length. Should you deem additional information on any point useful, I shall do my best to supply it.

1. *Background.*

In order properly to understand the complexity of the problem and the unjustifiable discrimination which would occur if community antenna subscribers and other private users of particular reception equipment were required to pay copyright royalties while other members of the public receiving ordinary commercial television broad- . . . .

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1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 5 (H. JUDICIARY COMM. PRINT 1965), pp. 1, 9, 139, 141-142, 148-149, 152-153

HOUSE COMMITTEE PRINT

89th Congress
1st Session

COPYRIGHT LAW REVISION
Part 5

1964 REVISION BILL
WITH
DISCUSSIONS AND COMMENTS

SEPTEMBER 2, 1965.

Printed for the use of the House Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

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WASHINGTON : 1965

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[1] 1964 REVISION BILL

Three identical versions of the 1964 bill were introduced during the second session of the 88th Congress: S. 3008 (Mr. McClellan) and H.R. 11947 (Mr. Celler) on July 20; and H.R. 12354 (Mr. St. Onge) on August 12. The text of the bill is as follows:

Copyright Law Revision, Part 5

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17 — COPYRIGHTS

Sec.

1. Subject matter of copyright: in general.

2. Subject matter of copyright: compilations and derivative works.

3. Subject matter of copyright: national origin.

4. Subject matter of copyright: United States Government works.

5. Exclusive rights in copyrighted works.

6. Limitations on exclusive rights: fair use.

7. Limitations on exclusive rights: effect of transfer of particular copy or phonorecord.

8. Limitations on exclusive rights: exemption of certain performances and exhibitions.

9. Scope of exclusive rights in pictorial, graphic, and sculptural works.

10. Scope of exclusive rights in sound recordings.

11. Scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords.

12. Scope of exclusive rights in nondramatic musical works: performance by means of coin-operated machine.

13. Limitations on exclusive rights: public communication of broadcasts.

14. Ownership of copyright.

15. Ownership of copyright as distinct from ownership of material object.

16. Termination of transfers of copyright ownership.

17. Execution of transfers of copyright ownership.

18. Recordation of transfers and other documents.

19. Pre-emption with respect to other laws.

20. Duration of copyright: works created after July 1, 1967.

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[9] (2) he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it.

§ 13. Limitations on exclusive rights: public communication of broadcasts.

Notwithstanding the provisions of section 5, the following are not infringements of the exclusive right to perform or exhibit a copyrighted work:

(1) communication of a broadcast embodying a performance or exhibition of the work to the private rooms of a public establishment by means of a system of loudspeakers or other devices, unless the person responsible for the communication or the operator of the establishment alters or adds to the content of the material included in the broadcast;

(2) reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is coin-operated.

§ 14. Ownership of copyright.

(a) INITIAL OWNERSHIP. — Copyright in a work protected under this title vests initially in the author or

authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) WORKS MADE FOR HIRE. — In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and owns all of the rights comprised in the copyright unless the parties have expressly agreed otherwise.

(c) CONTRIBUTIONS TO COLLECTIVE WORKS. — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work and any revisions of it.

(d) TRANSFER OF OWNERSHIP. —

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in the copyright, including any subdivision of the rights specified by section 5, may . . . .

* * *

[139] TRANSCRIPT OF MEETING ON 1964 REVISION BILL

New York, N.Y., August 7, 1964.

Present:

Abraham L. Kaminstein, chairman.
Mrs. Harriet S. Adams, Stratemeyer Syndicate.
Eugene N. Aleinikoff, National Educational Television and Radio Center.
Douglas A. Anello, National Association of Broadcasters.
Diana J. Auger.
J.S. Barnes, John Wiley & Sons, Inc.
J.G. Billo, Matthew Bender & Co., Inc.
Arpad Bogsch, United International Bureaux for the Protection of Intellectual Property, Geneva, Switzerland.
Mrs. Bourne, Bourne & Co.
Leon S. Brachman, United Artists.
Mauck Brammer, American Book Company.
Thomas C. Brennan, U.S. Senate Judiciary Committee.
John A. Bresnahan, Printing Industry of America.
Seymour Bricker.
Emerson Brown, American Textbook Publishers Institute.
Harry Buchman, Stern & Reubens.
Evelyn F. Burkey, Writers Guild of America, East, Inc.
Samuel J. Buzzell.
George D. Cary, Copyright Office.
J. M. Collins, American Society of Composers, Authors and Publishers.

John J. Cooke, McGraw-Hill Book Company.

Frederic S. Cushing, American Textbook Publishers Institute.

Richard B. Davis, Universal Pictures Co., Inc.

Lee C. Deighton, Joint Copyright Committee, Book Publishing Industry.

Walter J. Derenberg, New York University Law School.

Sidney A. Diamond, London Records, Inc.

Jean Dorfman.

Joseph S. Dubin, Universal Pictures Company, Inc.

Michael Dufinecz; Cooper, Dunham, Dearborn & Henninger.

* * *

[141] Michael Masnik, General Electric Co.

James C. McConnon; Paul & Paul.

Ernest S. Meyers, Record Industry Association of America.

Edward A. Miller, National Library of Medicine.

Morton Miller, Kapp Records, Inc.

Bernard Moss, National Arts Trust Fund.

Spencer Olin, Walt Disney Productions.

Harold Orenstein; Orenstein, Arrow & Lourie.

Robert C. Osterberg, Music Publishers Protective Association.

Averill C. Pasarow; Pasarow, Watkin & Ehrmann.

Joseph Paull, The Washington Post.

Sigrid H. Pedersen, Paramount Pictures.

Ralph Peer, II.

E. Gabriel Perle, Time, Inc.

John R. Peterson, Christian Science Church.

John Phillips, Book Manufacturers Institute.

Harriet Pilpel, Greenbaum, Wolff & Ernst.

Dana J. Pratt, Association of American University Presses, Inc.

Lawrence H. Reed, Doubleday & Co., Inc.

Barbara A. Ringer, Copyright Office.

Saul N. Rittenberg, MGM.

Harry N. Rosenfield, Ad Hoc Committee on Copyright Revision.

Gertrude Rosenstein, Paramount Pictures.

Stanley Rothenberg; Margulies, Heit & Rothenberg.

Edward A. Sargoy, American Bar Association.

Libby Schaeffer; Schaeffer & Schaeffer.

Morton Schaeffer; Schaeffer & Schaeffer.

Edith Schaffer, ABC-Paramount Records, Inc.

George Schiffer, National Community Television Association.

Adolph Schimel, Universal Pictures.

Sidney Schreiber, Motion Picture Association of America.

John Schulman, Consultant on Copyright to Christian Science Church.

S.Q. Shannon, The Greeting Card Association.

Jacob Shearer.

Paul J. Sherman, General Artists Corp.

D. Bruce Shine, Broadcast Music, Inc.

E. Stratford Smith, National Community Television Association.

Sigmund Steinberg; Steinberg, Richman, Price & Steinbrook.

Miriam Stern, American Guild of Authors and Composers.

O.R. Strackbein, International Allied Printing Trades Association.

Stuart F. Suchman, NET.

Samuel W. Tannanbaum; Johnson & Tannenbaum.

Emmett E. Tucker, Jr.; Hanson, Cobb, O'Brien & Tucker.

[142] Franklin Waldheim, Walt Disney Productions.

Alfred H. Wasserstrom.

I. Watson, Stratemeyer Syndicate.

Philip B. Wattenberg, Music Publishers Association.

Harold Wigren, National Education Association.

Harvey J. Winter, Department of State.

Theodora Zavin, Broadcast Music, Inc.

Leonard Zissu; Zissu, Marcus & Stein.

* * *

KAMINSTEIN. A former member of our staff has just flown in from Geneva, and I'd like to give the Deputy Director of B.I.R.P.I., the organization that administers the Berne Union, an opportunity to talk to the Panel. Arpad Bogsch. [Applause.]

BOGSCH. It is, as you can very well imagine, a very great pleasure for me to attend this meeting which, after a decade of arduous preparatory work, now has before it the first complete embodiment of the results of your discussions. The Register of Copyrights was so good as to invite the International Secretariat of the Berne Union to attend, and I am here today as a representative of the Geneva Bureau.

Looking upon your work — that of the Government and that of the members of the Panel — from the international viewpoint, it would be difficult to exaggerate its importance. To put it mildly, the whole copyright world is watching you, your work, with great hopes and expectations. After all, the United States leads today in every field of activity connected with copyright. Its authors' societies collect more royalties than those of any other country. Its book and periodical industry, its motion picture and phonograph record industry, its radio and television networks are the largest in the world. Because of its leading position in new inventions, the new technical devices for copying and transmitting are first tried out here and the legal implications are first tested here. Consequently, your work will have a great impact on the development of the copyright law all over the world. The world looks to you for inspiration to find equitable and practical solutions.

The first reactions to the bill abroad are highly complimentary. The relaxation of formalities and the life-plus-fifty year term are considered as the most important provisions, and also as an expression of willingness to collaborate with the rest of the countries. They will bring the United States into the mainstream of international cooperation, and in this shrinking world, in this world where, both intellectually and commercially, international ties become more and more important, these features of the bill will greatly serve United States interests.

May I add that, if the bill is passed in time before the Stockholm Revision of the Berne Convention, which is scheduled for 1967, this . . . .

* * *

[148] advance against royalties or account of royalties, and for the payment of royalties. That contract can be signed before the book is written, or after it is written, or while it is being written.

Under the definition that you have placed in the act, it is perfectly possible for the same author writing a book — a novel, a history, a textbook, or any other type of work — for the same consideration or the same compensation, and with the same degree of independence in the creativity of his work, to be considered as having written it "on special order or commission" if the contract was signed before the work was written. The same contract signed after the work was written would not be considered to make it a work "on special order or commission."

Many independent creative works are written by authors who say to a publisher, "I am about to write a novel. Would you like to publish it?" Or a publisher may say, "I'd like to publish your next novel. Will you publish with me?" And the author signs a contract before the work is written. That is not a work "on special order or commission" in any logical sense of the word as it relates to reversion or the duration of copyright.

The work is the independent creation of the author whether the publisher says "Why don't you write a novel about the Viet Nam conflict?" or "Why don't you write a history?" or "Why don't you write a textbook about science?" Whether he says it to the author and offers him a contract before the work is written or after the work is written, the author's rights should be protected, both as to the term of

copyright and as to duration. And this definition, which you have put into the act, would convert many independent creative works into "works made for hire," because authors cannot resist the pressure of a publisher who says, "I want you to sign that clause." They don't resist the pressure of the publisher today when he says, "I want you to give me the copyright for the original term and for the renewal term." The tie-in assignment of a renewal copyright is the way in which the renewal clause of the Copyright Act, which was written by Congress to protect authors against this very economic pressure, has been defeated.

WASSERSTROM. I would like to address myself to subsection (c) of section 14. I would like to point out that I take the law to be that if a transfer is made, absent limitations, there is a transfer of all rights, and it seems to me highly undesirable to single out publishers of collective works and to treat them differently. Now there may be occasions when the author should be considered the darling of the law, as he is in many of these provisions, but in this particular context it seems to me undesirable to treat the relationship between the author on the one hand and the publisher of a collective work on the other as facing each other in a different context.

[149] I think that you have done that by providing here a deviation from what I take to be the law today. You do that by providing that, in the absence of an express transfer, there are very limited rights granted to the publisher of a collective work — the publisher of a magazine or a periodical. I think it is undesirable to require an express transfer, not only because it runs counter to existing law, but because it runs

counter to settled practice in the magazine and periodical publishing field. Therefore I would suggest that the requirement that there be an express transfer be omitted from subsection (c) of section 14.

The other point that I would like to address myself to is just a relatively minor one. If this second sentence of section 14(c) is to remain, it seems to me that there should be some clarification as to what is meant by the phrase "and any revisions of it" in connection with the reproducing and distributing of a contribution as a part of a particular collective work. Treating it in the terms of this sentence, I'm not at all sure that the draftsmen intended to limit, in the absence of an express transfer, the publication on the part of the publisher to a particular issue of a particular periodical, thereby eliminating the relatively simple and generally accepted right of republication in the same periodical.

LINDEN. So that Mr. Rosenfield would understand why I speak on behalf of encyclopedias and reference works as well as textbook publishers, I'd like to explain the name "American Textbook Publishers Institute." The American Textbook Publishers Institute encompasses the publishers of encyclopedias, reference works, scholastic magazines, maps, charts, graphs, and so forth. As a matter of fact, in dollars-and-cents volume they represent eighty percent of the entire reference and technical field — in dollars, eight hundred million out of a billion last year. And, Mr. Rosenfield, the offer of a meeting still stands.

With respect to Irwin Karp's comments on employment for hire (both the definition and section 14(b)) the

encyclopedias, the reference works, the maps, the technical works — which operate and function and are created as composite works where the publisher participates creatively and orders and commissions segments, all of which are collated into the final work — are works made almost exclusively on special order or commission.

No publisher that I know of has a staff, for instance, of seven thousand top specialists in various fields of science, industry, philosophy, literature, and so forth, able to compile a first rate encyclopedia such as the kinds that are on the market today in the United States. No map publisher that I know of has a staff of top cartographers, artists, and art consultants to utilize in the making of the kinds of maps and varieties of maps that are available to the public for educational and all other purposes in the United States today.

* * *

[150] To talk about employment for hire while excluding therefrom the concepts of special order or commission creates an illusory employment-for-hire situation, and would result in negotiations for reversion with respect to anywhere from five to seven to eight to ten thousand individual contributors to the kinds of composite works and collective works to which I made reference. I submit that it would not be feasible for those works to be published under the kind of system of reversion which, under what Irwin Karp advocates, would include special order or commission.

May I point out further that the definition, which includes special order or commission if the parties so agree, does not

preclude — and I believe is intended to include — the evidentiary facts that the work was actually made on special order or commission of the publisher and that it is not a subterfuge. These words are being used in the statute, I believe, as words of art, and not as absolute terms for purposes of the definition.

* * *

[151] * * *

SCHIFFER: I would just like to comment briefly on the "joint work" provision. Coupled with the definition it would appear that the inten-[152]-tion is to preserve the existing law. The existing law is in a substantial state of confusion, having many unsettled questions.

One series of problems involves the situation of determining the intention and the right to treat separate contributions as a "joint work." In that respect, I wonder whether the definition, by simply stating that this is left to the intention of the authors, is sufficient protection for the authors in light of the cases indicating that such an intention may be spelled out from contracts that they separately make with a publisher.

The other problem is one in which I believe our bill should follow the recent foreign enactments, which rather carefully spell out the relationship between the co-owners and their respective rights against each other. Our law is not sufficiently clear to leave this simply in the phrase "co-owners." We should have a statutory provision with respect to obligations of cross-accounting and matters of that kind.

KAMINSTEIN. Well, as you know, there was considerable dispute about which way that sort of provision should be written.

PILPEL. There is obviously no provision of this proposed act of more importance to magazine writers and magazine photographers than section 14. Generally speaking, I think the Copyright Office has done an excellent job in setting forth what the law should be and, at the risk of disagreeing with Mr. Wasserstrom, also of what I think the law is. Mr. Wasserstrom referred to the law and settled practice today in terms of the ownership of all rights in a contribution to a collective work being acquired by the owner of the collective work. I will subsequently discuss the basis for that statement. In any event, this provision, which would continue the ownership of separate contributions to a joint work in the hands of each separate contributor, seems to me to reflect not only existing law but also the existing practice of all of the organized groups in the magazine industry and the newspaper industry.

I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c): ". . . and any revisions of it." If that means "any revisions of the collective work" in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or at least an ambiguity, that somehow the owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed or eliminated to make that absolutely clear.

As far as collective works are concerned, it seems to me that Mr. Karp is quite right in the statements which he made on behalf of authors. In particular, I should like to point out that, where lump sums [153] are paid, there is a tendency to regard the transaction as an employment for hire although it may not be. It is in that situation particularly that greater definition and clarification are called for, and it is in that situation particularly that reversion is called for, because there is no continuing payment.

KAYE. Section 18 applies the penalties for failure to record, I think, to an impracticably broad spectrum of conveyances. Under the definition there would have to be a recordation of a transfer of any exclusive right, whether or not limited in time or place of effect. All of the motion picture contracts which give a week's exclusivity, all of the assignments of performing rights — these hundreds and hundreds of thousands of conveyances — would suffer a penalty if not recorded. It is not practicable to record them, and I would suggest that consideration be made to reducing the onerousness of the provision.

KAMINSTEIN. I turn now to one of the key provisions in the law, the section on reversion, and call on Mr. Goldman to introduce it.

GOLDMAN. Section 16 is the section dealing with reversion. There have been some controversies about it, and not everybody is in accord on it. It is based to a large extent on proposals that were discussed from time to time in the past, and is an attempt to write out a formula which is pretty close to what had been discussed as a possible solution in the past. I think it's worth trying to explain how we intended this to operate,

because there have been two or three questions raised as to the meaning of some of the provisions of section 16.

I call to your attention first that, in the opening clause, "works made for hire" are excluded from the operation of the reversion provision. I also call to your attention that, under the opening clause, reversion is available only with respect to a transfer made by the author after January 1, 1967. In short, this would have no effect on contracts existing before the new law becomes effective; it would relate only to transfers made thereafter by the author.

Now the way this was intended to operate is this: the author if he is alive — or if the author is not alive, then the author's legatees or heirs or personal representatives as the case may be — would have the privilege of serving notice on the transferee, at any time during the 35 years from the time the transfer was executed, that he wanted to cancel that transfer. The termination, however, could not be made effective until at least 35 years had expired from the date of the transfer and until at least two years had expired from the time that the notice was served. The notice could be served at any time, but the transfer could not be effective until at least two years after the notice was served and until at least 35 years after the transfer had been executed.

The author if living, or his successor if the author is not living, could not transfer those same rights to anyone other than the holder of . . . .

* * * *

SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, PART 6 (H. JUDICIARY COMM. PRINT 1965), pp. xiv-xvi, 18, 68-69

HOUSE COMMITTEE PRINT

89th Congress
1st Session

COPYRIGHT LAW REVISION
Part 6

SUPPLEMENTARY REPORT OF THE
REGISTER OF COPYRIGHTS ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW:

1965 REVISION BILL

MAY 1965

Printed for the use of the House Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

* * *

WASHINGTON : 1965

* * *

PREFACE

[xiv] . . . opened his remarks by recalling President Kennedy's memorable address at Amherst College the month before his death, in which he said:

> I look forward to an America which will reward achievement in the arts as we reward achievement in business or statecraft.
>
> I look forward to an America which will steadily raise the standards of artistic accomplishment and which will steadily enlarge cultural opportunities for all of our citizens.
>
> And I look forward to an America which commands respect throughout the world not only for its strength but for its civilization as well.

President Johnson pointed to the Kennedy Center as symbolizing "our belief that the world of creation and thought are at the core of our civilization":

> Only recently in the White House, we helped commemorate the 400th anniversary of Shakespeare. The political conflicts and ambitions of his England are known to the scholar and the specialist. But his plays will forever move men in every corner of the world. The leaders that he wrote about live far more vividly in his words than in the almost forgotten facts of their own rule.

> Our civilization, too, will survive largely in the works of our creation. There is a quality in art which speaks across the gulf dividing man from man, nation from nation and century from century.
> * * *
>
> [I]t is important to know that the opportunity we give to the arts is a measure of the quality of our civilization. It is important to be aware that artistic activity can enrich the life of our people; which is the central object of government. It is important that our material prosperity liberate and not confine the creative spirit.

This unreserved recognition by the heads of our Government of the importance of creative endeavor in our national life is one of the most striking and encouraging of the trends that have emerged since 1961. At the same time it would be delusive to assume that there has been any general realization on the part of Government officials or the public that copyright is no less than the life's blood of this endeavor. Too many people still think of copyright law as the esoteric sporting ground of an "elite cadre," and regard its impact as confined to a handful of unimportant industries and special interests. They have not yet seen that the interrelation between copyright and the communications revolution is fully as important to our age as the interrelation between copyright and the revolution brought on by the printing press was to an earlier one. Somehow people must be made to realize that the copyright statute of a country not only shapes its cultural and intellectual development, but actually penetrates into the lives and thinking of every citizen.

Copyright Law Revision, Part 6

Speaking of automation someone observed recently that "invention is the mother of necessity": and in the copyright field this necessity is reaching crisis proportions. In recent years we have seen, among a multitude of technological developments, the introduction of com-[xv]munications satellites, the tremendous growth in information storage and retrieval devices, changing patterns in broadcasting including the emergence of educational television and community antenna systems, radical changes in teaching methods by the use of new audiovisual devices, the proliferation of copying machines, and remarkable developments in the use of video tape. Not only is the 1909 statute dismally inadequate to deal with what is happening; we now find that even our 1961 recommendations were not flexible and forward-looking enough.

I realize, more clearly now than I did in 1961, that the revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the evergrowing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize (in the words of Sir Arthur Bliss) "that the real heart of civilization, the letters, the music, the arts, the drama, the educational material, owes its existence to the author"; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural

progress by securing the author's exclusive rights to him for a limited time.

Since 1961 I have also acquired a deeper understanding of the importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not enough for us merely to seek and extend as much international cooperation as possible.

It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes. And, even where copyright relations exist, the lack of uniformity in the scope and standards of protection results in unfairness and endless confusion.

The United States can, if it will, offer leadership in the effort to evolve a truly universal copyright system that takes account of national interests while at the same time offering effective uniformity and a fair reward to all authors. Many of the newly-independent [xvi] nations are at a turning point in the development of their own copyright systems, and suggestions have been made for bridging the gap between the Berne and Universal Copyright Conventions. Copyright law revision is the first necessary step we can take in meeting this tremendous challenge.

Copyright Law Revision, Part 6

ABRAHAM L. KAMINSTEIN,
Register of Copyrights,
Copyright Office, The Library of Congress.

* * *

[18] . . . tion, or any other form in which a work may be recast, transformed, or adapted." Hence, in order to violate clause (2), some copyrighted portion of the work must actually have been appropriated as a basis for the infringing work. It would normally not be infringement, for example, for a critic to write a detailed commentary on the work or for an artist to draw illustrations inspired by a textual description.

Close questions can arise as to whether the preparation of material such as indexes, tests, answers to tests, study guides, work sheets, etc., constitutes an infringement of the work to which they are related. In some cases the dependence on the copyrighted source may be so great as to constitute infringement, and in others the only things taken may be uncopyrightable elements such as ideas or isolated facts. We believe that the definition of "derivative work" is broad enough to cover those works that appropriately come within the concept, and that the application of the definition in borderline situations of this sort must be left to the courts.

d. Use in Information Storage and Retrieval Systems

An important question that has emerged since publication of the *Report* in 1961 involves computer uses of copyrighted materials. Mainly in an effort to stimulate a

discussion of the issue, the preliminary draft of 1963 contained a provision granting an exclusive right "to reproduce [the work] in any form in the programming or operation of an information storage and retrieval system." We became convinced, however, that it would be a mistake for the statute, in trying to deal with such a new and evolving field as that of computer technology, to include an explicit provision that could later turn out to be too broad or too narrow. A much better approach, we feel, is to state the general concepts of copyright in language, such as that in section 106(a), which would be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.

At the same time, we should emphasize here that, unless the doctrine of "fair use" is applicable in a particular case, the bill contemplates that certain computer uses would come within the copyright owner's exclusive rights. It seems clear, for example, that the actual copying of entire works (or substantial portions of them) for "input" or storage in a computer would constitute a "reproduction" under clause (1), whatever form the "copies" take: punchcards, punched or magnetic tape, electronic storage units, etc. Similarly, at the "output" end of the process, the "retrieval" or "print-out" of an entire work (or a substantial part of it) in tangible copies would also come under copyright control.

* * *

[68] . . . made on special order or commission would not come within the definition.

Section 201(b) also provides that, "unless the parties have expressly agreed otherwise," the "employer or other person for whom the work was prepared * * * owns all of the rights comprised in the copyright." This would mean that the employer and employee could agree to any disposition between them of the exclusive rights under the copyright, but it would not allow them to change the status of a "work made for hire" under the statute. It was argued that there are some cases where a work must be written for hire (for example, because of collective bargaining agreements), but where the parties should be able by agreement to avoid some of the legal consequences of that status, particularly with respect to the length of the copyright term. There is no question that the parties to an employment contract should be able to agree as to the ownership of rights between themselves. However, if the work is in fact "prepared by an employee within the scope of his employment," we believe that its status as to third persons should be fixed under the statute and should not depend upon a private agreement between the employer and employee.

3. CONTRIBUTIONS TO COLLECTIVE WORKS

The first sentence of section 201(c) of the bill provides: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." This is intended to establish the significant principle that the copyright in a contribution and the copyright in the collective

work in which it appears are two different things, and that the usual rule with respect to initial ownership applies to the contribution.

The term "collective work" is defined in section 101 as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." As stated in the definition of "compilation" in the same section, a "collective work" is one kind of compilation, but it is a special kind. A "collective work," like any "compilation," must include "a number of contributions," thus ruling out, for example, the words and music of a song, a novel published with a preface, or a musical composition published with a picture on the cover. The contributions must constitute "separate and independent works in themselves," thus excluding, for example, lists of data or a work published with editorial revisions. Finally, the contributions must be assembled into a "collective" as distinguished from a "unitary" whole, thus leaving integrated works such [69] as the usual motion picture, sound recording, or dramatico-musical work outside the definition.

Under the present law, the owner of the copyright in a collective work as a whole is also the owner of copyright in the elements of compilation and editing, in any contributions that were made for hire by his employees, and in any contributions in which all of the author's rights have been transferred to him. The bill would leave this situation undisturbed but, as recommended in the 1961 *Report*, would clarify and simplify the extremely confused and

unsatisfactory situation now existing with respect to individual contributions that were not made for hire.

In conjunction with the notice provisions of section 403, the second sentence of section 201(c) would preserve the author's copyright in his contribution without requiring a separate notice in his name or an unqualified transfer of all his rights to the publisher. It would also establish a presumption that, in the absence of an express transfer, the author retains all rights except "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Under this presumption, for example, an encyclopedia publisher would be entitled to reprint an article in a revised edition of his encyclopedia, and a magazine publisher would be entitled to reprint a story in a later issue of the same periodical. However, the privileges under the presumption are not intended to permit revisions in the contribution itself or to allow inclusion of the contribution in anthologies or other entirely different collective works.

4. TRANSFER OF OWNERSHIP

a. In General

The first clause of section 201(d) states the fundamental rule that ownership of all or any part of a copyright is fully transferable from one owner to another by any form of assignment or conveyance or by operation of law, and that, upon the death of an owner, the rights he owned under a copyright are fully transmissible to his legatees or heirs.

The statement of this principle is supplemented by the definition of "a transfer of copyright ownership" in section 101: "* * * an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license." This definition is intended, among other things, to dispel any doubts as to whether mortgages or other hypothecations, discharges or mortgages, and exclusive licenses come within the meaning of a "transfer of copyright ownership."

* * * *

COPYRIGHT LAW REVISION: HEARINGS BEFORE THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS. (1965), p. 66

COPYRIGHT LAW REVISION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-NINTH CONGRESS
FIRST SESSION
PURSUANT TO S. RES. 48
ON
S. 1006

AUGUST 18, 19, AND 20, 1965

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

* * *

WASHINGTON : 1967

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Hearings on S. 1006

[66] DEVELOPMENT OF THE BILL

In the hearings on this bill held before Subcommittee No. 3 of the House Judiciary Committee earlier this year a question was raised as to why, in view of the fast-evolving communications technology, there have not been more frequent revisions of the copyright law. If there is a single answer to this question, I believe it is that there are so many interrelated creator-user interests in the copyright field, and they present such sharp conflicts on individual issues, that the consensus necessary for any general revision is extremely difficult to achieve. Examples of this difficulty are found throughout the concentrated efforts to revise the 1909 act which went on continuously between 1924 and 1940 and which all ended in failure and futility. Realizing fully what copyright law revision is up against, Arthur Fisher, my predecessor as Register of Copyrights, planned a program that would be based on a thorough knowledge of all the issues and a painstaking effort to resolve as many disputes as possible before a bill reached the stage of congressional hearings. It took us 10 years, but the program he planned has been carried out to the best of our ability.

The revision program started with the preparation and publication of 35 studies of the principal issues in revision, 34 of them printed by this committee. These were followed by the Register's Report on General Revision of 1961, which analyzed these issues and made detailed recommendations concerning them. Then followed a series of 19 panel meetings, numerous consultations, and a large volume of correspondence, with specialists and interested parties, during which a draft bill gradually emerged. In 1964,

a revision bill was introduced in the 88th Congress for the purpose of comment and discussion, and following further revisions the present bill was introduced in February 1965. In May of this year the Copyright Office issued the Register's Supplementary Report on General Revision, which explains in some detail the development, meaning, and thinking behind individual provisions of the bill. The report, the supplementary report, transcripts of the meetings, and comments have been printed by the House Committee on the Judiciary.

The bill as it has emerged is the product of intensive and extensive critical scrutiny over a considerable period of time. On the whole I believe it is technically sound and that, although improvements can still be made in language and structure, in general it is as clear and concise as the inherently complex subject matter permits. On matters of substance I regard the bill as a genuine improvement over the present law, and one of its strengths is that it is neither an "author's bill" nor a "users' bill." A number of its provisions represent carefully worked-out compromises which; while not especially welcome to either side on a particular issue, have proved a satisfactory way of balancing the interests. As a result, the bill has received gratifyingly widespread and strong support.

I hasten to add, of course, that not all differences have been resolved. Several serious and important issues remain unsettled, and they are certain to be hotly debated as these hearings proceed. But in listening and evaluating the arguments on both sides I urge you to keep two vitally important points in mind:

* * * *

COPYRIGHT LAW REVISION: HEARINGS ON H.R. 4347, 5680, 6831, 6835 BEFORE SUBCOMM. NO. 3 OF THE HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS. (1965), pp. iii, 29, 57, 66, 68, 1144, 1146-1147, 1426-1427, 1917

COPYRIGHT LAW REVISION

HEARINGS
BEFORE
SUBCOMMITTEE NO. 3
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
EIGHTY-NINTH CONGRESS

FIRST SESSION
ON
H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835

BILLS FOR THE GENERAL REVISION OF THE COPYRIGHT LAW, TITLE 17 OF THE UNITED STATES CODE, AND FOR OTHER PURPOSES

MAY 26, 27, 28, JUNE 2, 3, 4, 9, 10, 16, 17, 2???, 24, 30, AUGUST 4, 5, 11, 12, 18, 19, 26, SEPTEMBER 1 AND 2, 1965

Serial No. 8
PART 1

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Hearings on H.R. 4347

WASHINGTON : 1966

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PART 1

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Page

WEDNESDAY, MAY 26, 1965

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Statements by —

* * *

George D. Cary, Deputy Register of Copyrights, accompanied by Abe A. Goldman, General Counsel, Copyright Office, and Barbara Ringer, Assistant Register of Copyrights for Examining 29-60

* * *

Lee Deighton, chairman of the board, Macmillan Co., on behalf of the American Textbook Publishers Institute 66-79

* * *

[29] . . . pieces of legislation to come before the Congress this year. I believe this to be true, and for this reason I urge your favorable consideration of H.R. 4347.

Thank you, Mr. Chairman and members of the committee.

Mr. KASTENMEIER. Thank you, Mr. Mumford, for a splendid statement. I hope that the spirit of your statement — that is, reflecting the hope that we may be able to harmonize differences of opinion with respect to what is already in the bill — can be brought to fruition.

I might comment that the committee, dealing with certain aspects of the bill in former years, has not been able to reconcile even those aspects. We are asked to reconcile or to approve a whole package of ideas affecting copyrights. I hope to this end we will be successful. In any event I appreciate your statement.

Mr. MUMFORD. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Are there any questions?

Thank you very much.

Mr. MUMFORD. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The next witness will be the Deputy Register of Copyrights, who will be accompanied by his General Counsel, Mr. Abe Goldman, and Barbara Ringer, the Assistant Register of Copyrights for Examining.

I am referring to George D. Cary, the Deputy Register of Copyrights. Mr. Cary.

STATEMENT OF GEORGE D. CARY, DEPUTY REGISTER OF COPYRIGHTS; ACCOMPANIED BY ABE A. GOLDMAN, GENERAL COUNSEL, COPYRIGHT OFFICE; AND BARBARA RINGER, ASSISTANT REGISTER OF COPYRIGHTS FOR EXAMINING

Mr. CARY. My name is George D. Cary. I am the Deputy Register of Copyrights. I appear here, as has been indicated, solely because the Register is recuperating from an illness. I assure you that no one is more desirous of his quick recuperation than I.

I would like to introduce to you my two associates, Mr. Goldman, our General Counsel, and Miss Ringer, our Assistant Register for Examining.

At the conclusion of my remarks I would like for them to give you a brief summary or rundown of what the bill actually provides in its intricacies and they will be available to answer any questions you may have as to the technicalities of the bill.

My function is primarily to give you some of the background necessary to understand the bill. I would like to touch upon some of the new provisions in the bill and finally to point up some of the issues that are going to be controversial, about some which you may have already heard.

I would like to submit a prepared statement for the record. Because of its length I will try to abbreviate it as much as I can.

Mr. KASTENMEIER. Without objection, it may be received and made a part of the record.

(The document referred to follows:)

Remarks of George D. Cary, Register of Copyrights

Mr. Chairman, my name is George D. Cary. I am the Deputy Register of Copyrights and appear here today in the absence of the Register of Copyrights,

* * *

[57] The one thing I think should be mentioned has already been referred to by Mr. Cary: clause (5) would exempt the relay of a broadcast without changing it in any way where no profit motive is involved. But since the exemption is granted only where there is no profit motive, this exemption would not extend to CATV systems. In short, CATV systems, since they are operated for profit, would not be exempt.

Mr. KASTENMEIER. May I stop you at this point and suggest that we might discontinue the detailed discussion of the bill, at least temporarily, and resume it perhaps this afternoon. I think there may be some general questions that we will want to ask of Mr. Cary. Then I would like at least to get to one or two of our other witnesses before the noon break.

Knowing that you are going to be available, I think the more scholarly and instructive portion, the detailed portion of the discussion of the bill, can come somewhat later in the day, and we will have a chance to hear from some of the other people as well.

Mr. TENZER. Mr. Chairman, will Mr. Goldman and Miss Ringer be here throughout the hearings?

Mr. KASTENMEIER. That is my understanding.

Mr. TENZER. Would it not be of great significance and value to the committee if they were here and then following some of the testimony that might be offered to have the views of the division and these witnesses at that time?

Mr. KASTENMEIER. Yes.

Mr. TENZER. These will be long and protracted hearings. We will have missed the significance of the comments at this point.

Mr. KASTENMEIER. We can discuss that at the break. In any event I think this portion of it is somewhat necessary for purposes of the hearing.

I would like to ask a general question or two of Mr. Cary before proceeding. You indicated that we may not have another general revision of copyright law for many years, perhaps 50 or more years. Considering that it was extremely difficult to anticipate the technology of the last 50 years, do you think we should attempt to do this in the future: that is, to anticipate what technology may eventually bring in

printing or in reproduction or in anything else, in broadcasting, in the years ahead? Isn't it virtually an impossible task to anticipate these changes?

Mr. CARY. It would seem to us that is a correct statement. As a matter of fact, that is the basis on which we drafted this bill. For example, you can read the bill from beginning to end and you won't find in it any reference to computers, for example. Yet these are one of the coming instruments of communication in the future. We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of the new advancing media. This is our hope.

Mr. KASTENMEIER. Does it not seem indicated that what Congress and indeed you may need to do is to have a more frequent revision, perhaps every 20 years rather than every 50 years or 75 years?

Mr. CARY. That would be most desirable but it probably is not possible. Efforts to revise the 1909 law started in 1924 and went on actively for more than 15 years. It has taken nearly 10 years to develop . . . .

* * *

Hearings on H.R. 4347

[66] * * *

STATEMENT OF LEE DEIGHTON, CHAIRMAN OF THE BOARD, MACMILLAN CO., ON BEHALF OF THE AMERICAN TEXTBOOK PUBLISHERS INSTITUTE

Mr. DEIGHTON. Mr. Chairman, I am Lee Deighton, chairman of the board of the Macmillan Co., which was established in this country in 1896. For the past 38 years, I have been engaged in the writing, editing, and selling of instructional materials for the schools and colleges of our country. Today I speak as a representative of the American Textbook Publishers Institute. I offer my prepared statement for the record.

(Mr. Deighton's statement is as follows:)

PREPARED STATEMENT OF THE AMERICAN TEXTBOOK PUBLISHERS INSTITUTE ON H.R. 4347

Mr. Chairman, I am Lee Deighton, chairman of the board of the Macmillan Co., which was established in this country in 1896. For the past 38 years, I have been engaged in the writing, editing, and selling of instructional materials for the schools and colleges of our country. Today I speak as a representative of the American Textbook Publishers Institute.

Permit me first to identify this organization. It is a trade association of 110 members who account for 90 percent of the textbooks, reference books, tests, and maps used by our schools and colleges.

The total sales of these companies in 1964 were $945 million. And of this total, $509 million were sales of textbooks primarily to domestic schools and colleges. No single company in this highly competitive industry had more than 12 percent of the total industry volume in 1964.

* * *

[68] These three areas of cost: editorial, plant, and inventory — are of approximately equal weight. What do they come to in production of a book or a series of books? A single high school textbook will require investment of $50,000 before the first copy is available for sale. A series of elementary school textbooks with many components will require as much as $1 million investment before it is ready for marketing.

Textbook publishing is, in a very real sense, risk enterprise. There is no way to know in advance that a book or a series of books will sell. We can and do test our product in classrooms at various stages of development. But we cannot know the market response to our products until they are published. Schools do not buy on prospect: they buy only with product in hand. Some industries can market-test a mockup of a product. We do not enjoy this luxury. We cannot market-test a product until we have a full inventory in our warehouses.

Textbook publishing is a risk enterprise, and it is an enterprise that requires courage and creativity. What is the net return for this speculation? In 1964, the return after taxes was approximately 8 percent for the entire textbook industry.

I have taken this much of your time with the nature of textbook publishing in order to explain why copyright is so important to us. It is the only protection we have against piracy or copying which would destroy our market and jeopardize our investment. In short, if anyone may copy our work without license, one book would do where a hundred have been used before.

Our country is indeed fortunate that the Congress is so well informed through many of its committees on the technological advances in handling information. You are well aware of photocopying, and the use of microfilm and magnetic tape in storing and retrieving information.

New devices in this field are arriving at a breathless pace. Only a few days ago five new machines were introduced for printing from microfilm at a cost of 2 cents per page. It has become literally cheaper to copy printed materials than to buy an original copy. As a consequence of rapid changes in technology, the cheerfully reassuring Fry Report of 1962 on photocopying is obsolete. There is scarcely an institution of higher learning today that is not equipped with photocopy machines, used to copy the pages of books. For a look at the near future it is necessary to go back no further than April 8, 1963, publication date of a study prepared by the American Library Association for the Rome Air Development Center of the U.S. Air Force. The title of the study is "The Library and Information Networks of the Future." On page 21 we find these words: "Using xerographic printers, report duplicates in hard copy could be prepared locally. Or, with facsimile, it would be possible to scan the basic report in the center and have it reproduced miles away at a remote regional

location. It could also be scanned with video and reviewed on a TV monitor elsewhere. Finally, it could be duplicated on file in its microform and forwarded to the user in that way. In any event, the integrity of the basic file would remain intact, and the electronic information center would become a duplicating rather than a circulating library."

These new developments promise an exciting future in which information handling and communication will be improved not only for schools but for our entire society. Textbook publishers welcome these technological advances. They want their materials used in these new devices. They ask only that these uses be protected by copyright so that they will be paid for, just as the devices are to be paid for.

Few of us today can imagine the technological changes that lie ahead. The advances in information science and technology make revision of the copyright law imperative. The forward reach of technology requires careful evaluation of the proposed law so that we may avoid by inadvertency a defeat of the very purpose of copyright: to provide incentive.

The American Textbook Publishers Institute is a proponent of copyright revision, but with an eye to the future we respectfully urge that portions of the proposed legislation be amended to make it consistent with the purpose of copyright.

Let me turn now to the second part of this statement: the specific sections of the bill which seem likely to have impact upon our industry. Here I cannot speak as a lawyer but only as a practicing publisher. I am aware that the technical

language in a bill such as this is extremely important. I am aware that words in general usage take on specific meaning in the context of a law.

* * *

[1144] Mr. KASTENMEIER. Mr. St. Onge.

Mr. ST. ONGE. I have no questions, Mr. Chairman, but I think Professor Boyd should be complimented on a very articulate presentation of his case.

Dr. BOYD. Thank you.

Mr. KASTENMEIER. Mr. Tenzer.

Mr. TENZER. I share the sentiments of my colleague, Mr. St. Onge. I hope this statement is not copyrighted because there are some very brilliant phrases and paragraphs in it that I would like to use myself.

Dr. BOYD. Thank you, Congressman, it is entirely at the disposal of the committee.

Mr. KASTENMEIER. Mr. Hutchinson.

Mr. HUTCHINSON. I have no questions.

Mr. KASTENMEIER. Thank you very much.

Dr. BOYD. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Our next witness is Mr. John F. Banzhaf III, president, Computer Program Library. You have, I take it, no copies of your statement?

STATEMENT OF JOHN F. BANZHAF III, PRESIDENT, COMPUTER PROGRAM LIBRARY

Mr. BANZHAF. I have one copy. I will be happy to send you additional ones if you like.

Gentlemen, it is both an honor and a privilege to appear before you today to tell you what I can about the effect the proposed copyright law will have on the computer industry; in effect, to take your minds away from the consideration of the past and into problems which will be raised by the future.

Basically I hope to consider with you only two topics. These are copyright protection for computer programs and the use of copyrighted material in information storage and retrieval systems.

Perhaps the best way to begin is to introduce myself. About a year and a half ago, as part of a research project for the Columbia Law Review, I developed and submitted two computer programs to the Copyright Office for registration. After some correspondence they reversed their previous position and for the first time agreed to register copyrights on computer programs.

I thereafter wrote an article for the Columbia Law Review on copyright protection for computer programs and several other articles on legal protection for programs and

copyright aspects of computer usage. In addition I have appeared on or attended several panels dealing with the topic, have discussed it with many interested people and in general have tried to keep abreast of opinions in this area.

Computer Program Library itself is a company very recently organized to serve as a central registry and clearinghouse for all copyrighted programs offered for use to the public. In my capacity as president I have had an opportunity to correspond with many programers and computer users interested in offering their copyrighted programs to others or in using copyrighted programs for a reasonable fee. Responses so far have been very encouraging.

I understand that no one else has requested permission to appear before this subcommittee to present the views and positions of the . . . .

* * *

[1146] Since there appears to be no substantial opposition to extending copyright protection to computer programs I will be quite brief in explaining why I feel it is a giant step forward for the computer industry. In the United States today over a billion and a half dollars are expended annually, directly or indirectly, in the development of computer programs. By the end of 1970 over half a million people are expected to be employed in programing activities having an annual economic value equal to that of all computer manufacturing.

Programing today is certainly big business. But the development of programing has been severely inhibited by the lack of legal protection. The Patent Office has ruled that programs cannot be patented. Thus, without copyright protection, programs cannot be distributed on a wide scale with the hope of financial gain. The result has been waste, needless duplication of programing effort, and many valuable programs which were never written. Programs which were written were often kept secret to take advantage of trade secret protection. Many programs were never written because none of the development costs could be passed along to other users.

With copyright protection, much of this will change for the better. Program writers will be able to develop programs for a wide market rather than waiting for a single large user to request a particular program. Programs previously kept secret may be made available under copyright protection for a small leasing fee. All in all, computer programs will finally be put on the profit system which so far has always served to encourage creativity and the interchange of valuable information. Gentlemen, I wholeheartedly support the bill insofar as it extends copyright protection to computer programs.

In this regard I think I speak also for the computer industry. I can say that I have heard no serious objections to this position and that this is also the position of Mr. Eichelberger who is chairman of the Committee on Copyrighting and Patenting Computer Programs for the Association of Computing Machinery.

My position is quite different, however, with regard to the bill as it applies to computers used in information storage and retrieval systems. Here I must respectfully suggest that the bill as it now appears goes too far. I feel that if the bill is enacted in its present form, electronic information retrieval systems will be unfairly burdened and that users will be prohibited from using copyrighted material in ways which would otherwise be lawful if a computer were not involved.

I think this point is particularly important because there has been so little discussion on the topic. What little discussion has occurred was by representatives of other groups whose interests were usually contrary to those of computer users. Even here the statements were usually prefaced by such remarks as, "Well, I don't feel competent because I don't understand these machines well enough," or "I don't understand this business either." (See pp. 120-121, "Copyright Law Revision," pt. 3, preliminary draft for revised U.S. copyright law and discussion and comments on the draft.) Perhaps then the best way to approach the problem, I think, would be to examine how computers function in this area.

Computers are used in information storage and retrieval systems because of their ability to scan material at an almost unbelievable speed. As they scan this material, they can examine it for key words and [1147] symbols or perform other more complicated operations upon it. The material which they scan can be of several different types. In the simplest cases, they scan lists of titles, or symbols representing them, to match these against the request of the researcher. This activity itself presents no copyright problems because an author has no copyright in the mere title of his work.

The output of the search is a list of titles and their citations. It seems clear that such an activity cannot hurt the author and probably works to his benefit if the readers and researchers are led to his works.

In the second case the computer scans the copyrighted material itself. The work it scans may be recorded in a computer medium such as magnetic tape or, with the use of some newly developed devices, the computer may scan the printed work directly.

Here there are some serious copyright problems. It seems clear that it would be a violation of the author's copyright if the output of the search would be a print-out of a substantial portion of the author's work. It is not clear whether it would be a violation of his copyright to scan the work with the aid of a computer or whether the making of the magnetic tape to facilitate the scanning operation itself constitutes an independent violation.

Another copyright problem results when the computer itself performs some operation on the copyrighted work. In an extreme case a computer could translate the work in another human language or create a complete summary or abstract of it. In other cases it may digest the copyrighted work into a single sentence or set of symbols.

The resulting work may be for the benefit of the computer — in other words, to be scanned by the computer in later searching operations — or it may be for the benefit of human readers and research. Once again the computer may scan the work in the form of magnetic tape or directly from the copyrighted printed work.

I have heard several proposals for dealing with this problem. Reed Lawlor, an attorney very active in this field, has argued and suggested to the committee that an otherwise legitimate use of a copyrighted work should not be stigmatized simply because a computer was used to accomplish the same result.

He has briefly stated his view as follows: I am quoting from a letter to this subcommittee of March 8, 1965:

When the copyright law is revised, the copyright owner should continue to have the right to prevent the use of his copyrighted material in the printed output of the computer beyond the bounds of fair use, but he should not have the right to prevent the feeding of the work into the computer, since normally the output will be a kind which would be fair use if no computer were used.

He has suggested in this regard the following amendment to section 107 of H.R. 4347. It says:

To the extent that copyrighted material is recorded in a computer readable form in an automatic information processing system and is used to generate and disseminate information in a manner which would be considered fair use if the automatic information processing system were not involved, such recording and use should be deemed a fair use.

The Electronic Industries Association has taken a very similar position. This was mentioned in their letter to the subcommittee dated May 8, 1965.

I think their position is a sound one and I urge this subcommittee to give it careful consideration.

* * *

[1426] * * *

Mrs. LINDEN. Information storage and retrieval began as a response to the flood of data and reports emerging from the enormously ex-[1427]panded research efforts of the past two decades. Currently it is being applied not only to research but to education as well.

Its basic instrument is the computer which stores information on magnetic tape, but information systems are based also on microfilm and punchcards of several kinds.

At Bethesda, Md., stands the National Library of Medicine. It houses a sophisticated computer system and a highly trained staff who read and index all of the articles appearing in current medical journals and books.

The computer collates and prints out the Index Medicus, which is published and distributed on a regular schedule. The information system known as "Medlars" is primarily devoted to indexing.

A related but significantly different information retrieval system was announced in the New York Times on March 4, 1965. In announcing the joining of these three major universities, Harvard, Yale, and Columbia medical school libraries, in a computer and telephone line system, the article

continues to state that this system will be equally adaptable to groups of law, business, or general libraries as well. And now I quote:

When telecommunication and photographic reproducing devices are added to the network system, it will be possible to eliminate some duplication of material among libraries. Pages from a book in New York could be flashed to a user in another city and even reproduced for him in take-home form.

Later in the same news item, Thomas P. Fleming, head of the Columbia University Medical Library, states:

With the computer you can enter many, many more subject headings. These go in compact, miniaturized form on magnetic tape and are stored on discs. Just as in a jukebox when a person pushes the button, the arm finds what he wants, so the searching arm goes along with the discs and picks out what the researcher wants.

The difference between "Medlars" and the medical library network is clear. At present, "Medlars" is devoted primarily to the indexing of journal articles. The new network is designed to retrieve and print out information from books.

"Current Research and Development in Scientific Documentation," volume No. 13, dated November 1964, issued by the National Science Foundation updates similar volumes previously published. In close to 500 pages, the current status of 150 information storage and retrieval systems is described. These include the activities not only of Government-sponsored research projects of universities,

but of many of our major corporations such as Radio Corp. of America, Philco Corp., Motorola, Sperry Rand, IBM, ITEK, Bell Telephone Laboratories, Burroughs, Magnavox, and Chrysler Corp.

May I call your attention to page 243 of this publication which reports on the Recordak Corp., a subsidiary of the Eastman Kodak Co. The Recordak Lode Star Reader-Printer described in this report is in operation here in Washington.

It makes possible automatic location and reproduction either on a screen or on paper the pages of a book or journal located in a central storage miles away. I have seen this system in operation.

The access time for locating a document out of many thousands and flashing it on the screen is approximately 7 seconds. Print-out — which is the reproduction in hard copy form of as much of these articles or books as you choose — appeared to me to be as rapid.

* * *

[1917] nology in the national interest. I am glad to transmit herewith, for consideration by your committee, a copy of the statement prepared by our ad hoc committee on April 22, 1965.

Yours sincerely,

FREDERICK SEITZ, *President.*

Hearings on H.R. 4347

STATEMENT BY AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

The National Academy of Sciences-National Research Council has among its concerns the advancement of science and the widest dissemination and use of scientific information. For these reasons, the Ad Hoc Committee on Copyright Law Revision met recently to consider the possible effects of the bills to revise the copyright law (H.R. 4347 and 8. 1006) now before the Congress. The following is a summary of committee consensus on selected sections of the bills.

Among the more important sections is section 107, "Limitations on exclusive rights: Fair use," which permits fair use of copyrighted work without infringing copyright. We support this first statutory recognition of fair use as a doctrine, and we urge that no defining language be added, leaving the courts to decide specific cases. This position is a result of our difficulty in predicting what new forms of copying might arise In the future; we favor a broad and qualitative approach.

In our opinion, certain sections of the bill are particularly favorable for the individual scientific author. This is true of sections 201(c) and 204(a) relating to the ownership of copyright in collective works and to the requirement for a written transfer of copyright. We support these sections as we feel that the regularity and clarity of the procedures would more than offset their slight additional recordkeeping requirement.

Another important statement of proposed copyright policy occurs in section 601(b)(2), where importation of 3,500 copies of a copyrighted work manufactured abroad is permitted. We favor this section as it is a broadening of the present law and is appropriate to a wider use and dissemination of scientific information. It would appear that the interests of science might best be served by the eventual elimination of any requirement for domestic manufacture.

Section 105, "Subject matter of copyright: United States Government works," refers only to works prepared by officers or employees of the Government and does not refer to the ownership of copyright in works resulting from Government contracts. As we understand this situation, omission of the latter topic means that the present practice will continue; i.e., that the language of each contract will specify ownership of copyright. In our opinion, this flexibility of approach is desirable and should be supported as a general principle. Where special requirements for Government departments and agencies are necessary, they can be dealt with by administrative arrangement.

The committee will continue to follow the discussion of the copyright law and may from time to time supplement this statement.

Prof. W. ALBERT NOYES Jr.,
Chairman, Ad Hoc Committee on Copyright Law Revision.

APRIL 22, 1965.

NATIONAL BROADCASTING CO., INC.,
New York, N.Y., September 15, 1965.

Hearings on H.R. 4347

Hon. EDWIN E. WILLIS,
Chairman. Subcommittee No. 3, Committee on the Judiciary, House of Representatives, Washington D.C.

DEAR CONGRESSMAN WILLIS: NBC has not participated directly in the hearings which subcommittee No. 3 has been conducting upon H.R. 4347 because it felt that its views were adequately represented by the National Association of Broadcasters. NBC supports the enactment of H.R. 4347 with the changes recommended in the testimony of Mr. Douglas A. Anello, general counsel of the NAB. There is one subject, however, upon which we would like to amplify the NAB testimony — the relationship of the copyright law to CATV systems.

NBC, in numerous comments filed with the Federal Communications Commission, has consistently taken the position that CATV systems are making an unauthorized use of program material when they distribute over their systems the programs of a broadcast station without having obtained the consent of that

* * * *

112 CONG. REC. 24066 (1966) (SUMMARY OF PRINCIPAL PROVISIONS OF H.R. 4347, INSERTED BY MR. KASTENMEIER)

CONGRESSIONAL RECORD — HOUSE

[24066] September 27, 1966

CHAPTER 2: OWNERSHIP AND TRANSFER OF COPYRIGHT

Section 201: Copyright ownership
Initial ownership

Section 201(a) restates the established principles that copyright ownership originates in the author, and that the authors of a "joint work" are co-owners of the copyright. Under section 101 a "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

Works Made for Hire

Subsection (b) retains the present principle governing works made for hire: that is such cases "the employer or other person for whom the work was prepared is considered the author." A "work made for hire" is defined in section 101 to include not only "a work prepared by an employee within the scope of his employment," but also a group of special types of works that have been "specially ordered or commissioned" for certain specified purposes. If there has been an express agreement to consider the work as one "made for hire."

112 Cong. Rec. 24066 (1966)

Contributions to Collective Works

Section 201(c) states explicitly that each individual contribution to a collective work such as an encyclopedia article or a story first published in a magazine, is considered a separate work in which copyright ownership "vests initially in the author." Subsection (c) also establishes a presumption that, in the absence of an express transfer, the author retains ownership of copyright in his contribution and the publisher acquires only certain publishing rights.

Transfer and Divisibility of Copyright

Copyright ownership is transferrable under the bill, as under the present statute, by any means of conveyance or by operation of law. Clause (2) of section 201(d) is intended to solve the problems that have arisen under existing law because of the theory that copyright is indivisible: it provides that "any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred * * * and owned separately."

H.R. REP. NO. 2237, 89TH CONG., 2d SESS. (1966), pp. 116-117

HOUSE OF REPRESENTATIVES

89th Congress
2d Session

REPORT
No. 2237

COPYRIGHT LAW REVISION

OCTOBER 12, 1966 — Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4347]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4347) for the general revision of the copyright laws, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

H.R. Rep. No. 2237

That title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17 — COPYRIGHTS

CHAPTER		Sec.
1.	SUBJECT MATTER AND SCORE OF COPYRIGHT	101
2.	COPYRIGHT OWNERSHIP AND TRANSFER	201
3.	DURATION OF COPYRIGHT	301
4.	COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION	401
5.	COPYRIGHT INFRINGEMENT AND REMEDIES	501
6.	MANUFACTURING REQUIREMENT AND IMPORTATION	601
7.	COPYRIGHT OFFICE	701

H.R. Rep. No. 2237

CHAPTER 1 — SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.

101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matter of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: Fair use.
108. Limitations on exclusive rights: Reproduction of works in archival collections.
109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.

* * *

[116] "work made for hire": in addition to works prepared by an employee within the scope of his employment, the definition provided four special cases (contributions to collective works and motion pictures, translations, and supplementary works) that would be considered works made for hire if the parties agreed to this result in writing. The bill contained a separate definition, with examples, of a supplementary work: a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work.

H.R. Rep. No. 2237

After introduction of H.R. 4347 a number of representatives of author and publisher organizations succeeded in reaching a compromise that was presented at the hearings. In effect, this compromise was aimed at adding additional categories to the four types of commissioned work dealt with specially in the definition of works made for hire, and at somewhat broadening (or at least clarifying) the correlative definition of "supplementary work."

After full consideration the committee has decided to incorporate the substance and much of the language of this compromise in the bill. In addition to the four classes originally listed in H.R. 4347, the commissioned works to be accorded special treatment include "a compilation," "an instructional text," "a test," and "an atlas." The committee wishes to make clear that the agreement referred to in the definition must not only be in writing but must also be signed by the parties.

The definition of "supplementary work," which has now been made a part of the definition of "work made for hire," has been broadened to cover material prepared for purposes of "concluding" and "revising" another author's work, and the examples have been amplified to include "afterwords," "musical arrangements," and "answer material for tests."

One of the most important substantive changes in the definition involves the incorporation of "instructional texts" among the categories of commissioned works that can be considered "works made for hire" upon agreement of the parties. This new term is given its own definition in the committee's amendment: "a literary, pictorial, or graphic

work prepared for publication with the purpose of use in systematic instructional activities." The concept is intended to include what might loosely be called "textbook material," whether or not in book form or prepared in the form of text matter. The basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities," and they are to be distinguished from works prepared for use by a general readership.

Contributions to collective works

Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collective works" would ordinarily [117] include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a

"separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as to the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 403 dealing with copyright notice, will preserve the author's copyright in his contribution even if the contribution does not bear a separate notice in his name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Although magazine publishers objected

to this presumption as discriminatory, the committee believes that it is fully consistent with present law and practice and that it represents a fair balancing of the equities.

The magazine contributors, while strongly supporting the basic presumption in their favor, suggested that the last clause be deleted as unduly restrictive. However, the committee considers this clause, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, as an essential counterpart of the basic presumption. Under the language which has been retained a publisher could reprint a contribution from one issue in a later issue of his magazine, or could reprint an article from a 1970 edition of an encyclopedia in a 1980 revision of it: he could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

Transfer of ownership

The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to he treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance,

* * * *

COPYRIGHT LAW REVISION: HEARINGS BEFORE THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 1ST SESS. (1967), pp. 1135-1137, 1139, 1142-1143

COPYRIGHT LAW REVISION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETIETH CONGRESS
FIRST SESSION
Pursuant to S. Res. 37
ON
S. 597

PART 3
APRIL 6, 11 AND 12, 1967

PART 4
APPENDIX AND INDEX

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

* * *

WASHINGTON : 1967

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Hearings on S. 597

[1135] STATEMENT OF HARRIET F. PILPEL ON BEHALF OF THE AMERICAN SOCIETY OF MAGAZINE PHOTO-GRAPHERS AND THE SOCIETY OF MAGAZINE WRITERS ON S. 597 FOR SUBMISSION TO THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON MAY 10, 1967

My name is Harriet F. Pilpel. I am a senior partner in the New York law firm of Greenbaum, Wolff & Ernst; a member of the United States Copyright Office Panel of Experts; a trustee of the Copyright Society of the United States; co-author with Morton D. Goldberg of the book, "A Copyright Guide"; co-author with Theodora S. Zavin of the book, "Rights and Writers"; and author of a monthly column entitled, "But Can You Do That?" in the magazine "Publishers Weekly."

I submit this statement as General Counsel for the American Society of Magazine Photographers and the Society of Magazine Writers. Both organizations derive their membership from all over the country.

* * *

[1136] The Bill defines "collective work" in § 101 as a "work, such as a periodical issue, anthology or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Obviously, this defines the medium in which the Magazine Photographers and Magazine Writers

operate. Their importance to life and letters in the United States is considerable. One need only remember the statement that one picture can be worth 1500 pages of text or to recall that such major seminal contributions to the law as the very concept of "the right of privacy" first appeared in a periodical. Under the present law, confusion and hardship keynotes the copyright situation of contributions to periodicals or other collective works. It is not clear, in the absence of a separate copyright notice, who owns what part of such works or of the separate contributions of which they are comprised; or what kind of copyright notice the collective work should carry (e.g., is one overall new notice in the name of the owner of the collective work sufficient, or must there be a listing of the prior effective copyright notices of all the constituent works or both?). Moreover, in the case of photographs or other works of graphic art, a further question arises as to the relation between the original physical picture, for example, and the right to reproduce it. The present manufacturing clause of the copyright act bears down heavily on United States contributors to foreign books, *magazines and newspapers* — with respect to illustrations and photographs as well as text. In most instances, the United States contributor to a foreign work, of course, has no control over where it is printed so that loss of his copyrights is an ever present threat. And this, despite the fact that surely among our best ambassadors of good will to friend and foe abroad are magazine photographers and writers who are in a unique position to interpret the United States to the rest of the world.

Many of the confusions and ambiguities in the present law will disappear if the proposed bill is enacted into law. Thus, § 201(c) of the Bill provides:

"(c) CONTRIBUTION TO COLLECTIVE WORKS. — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

* * *

[1139] The organizations I represent and, of course, I myself greatly appreciate this opportunity to submit this statement, and hope that as a result of these Hearings, the Committee will report the Bill favorably and the Senate promptly enact it.

Respectfully submitted,

HARRIET F. PILPEL,
General Counsel for American Society of Magazine Photographers and Society of Magazine Writers.

* * *

Hearings on S. 597

[1142] * * *

STATEMENT OF TOM MAHONEY, ON BEHALF OF THE SOCIETY OF MAGAZINE WRITERS, ON S. 597, FOR SUBMISSION TO THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON MAY 10, 1967

My name is Tom Mahoney. I live in New York and am a member of the Copyright Committee of the Society of Magazine Writers. We are an organization of more than 200 men and women who write for practically all the general magazines and also for the magazine supplements of the newspapers. Many also are authors of books.

We have quarters in the Overseas Press Club, 54 West 40th Street, New York City. About half the members live in the New York area, but the others are widely scattered.

We have a dozen members in the Washington, D.C. area. Senator Jennings Randolph of West Virginia is a member. The late Senator Richard Neuberger of Oregon was a member for several years. John Bartlow Martin, former Ambassador to the Dominican Republic is a member.

In Connecticut we have seventeen members, including Bernard Asbell, Albert Maisel, Vance Packard and John Tunis. In addition to countless articles for magazines of great circulation, all have written books. You may recall Packard's "Hidden Persuaders" and Asbell's "When F.D.R. Died."

We have several members in Pennsylvania, one in Detroit and two with well known names in the Hawaiian Islands. These are Bill Lederer and Richard Tregaskis. You probably recall Tregaskis' "Guadalcanal Diary" and Lederer's Navy stories and his co-authorship of "The Ugly American."

In an age when radio and television, aided by man-made satellites of this planet, transmit the products of American authorship in an instant throughout the world, and at a time when world peace and worldwide understanding of our country's inhabitants and their ideals were never more vital to our security as a nation, we believe that this Bill in §§ 302 through 305, wisely brings this country into line with all other countries that are major exporters of cultural products in the family of nations, by undertaking to secure the rights of authorship within this nation for a period of time equal to the life of the author plus fifty years. Other organizations of writers either have treated or will treat of this theme more fully; we are confident that the views that they will express on this subject will entirely coincide with our own.

So, too, we hail the prudent provisions of §§ 203 and 304(c) of this bill, limiting the duration of an author's assignment of his rights to a period of thirty-five years. Again, we fill confident that other authors' organizations will have more to say on this subject thoroughly coincident with our views. We content ourselves, therefore, by saying that, though no other provisions of this bill have, in the years of study of which it is the product, been more hotly debated between authors and users, the resulting harmonization and compromise of their conflicting views is as statesmanlike as it is necessary.

Hearings on S. 597

Of major benefit to our members are the provisions that expressly recognize the separable nature of the bundle of rights that we call "copyright", and which do away with the unrealistic concept of an "indivisible" copyright. We refer particularly to §§ 201(c), 403, and 501(b) of the instant bill. These sections represent a major improvement over existing copyright law, and serve to clarify the rights of contributors to periodical literature—a subject that has heretofore been surrounded by much doubtful legal disputation.

[1143] Ideally, of course, we should have liked to see an end made to two vexing formalities whose principal effect in times past has been to serve as traps for unwary authors: the requirements of copyright notice and of domestic printing (the latest being generally referred to as the "manufacturing clause"). We recognize, however, that here, too, a compromise of conflicting views was essential to achieve a bill that would have the support of most, if not all, of the interests affected. The prior rigors of both requirements have, in the process, been much softened, and we are reasonably content with the result.

Accordingly, we urge your Subcommittee to approve the pending bill.

Respectfully submitted,

SOCIETY OF MAGAZINE WRITERS
BY TOM MAHONEY

* * * *

COPYRIGHT LAW REVISION: HEARINGS ON H.R. 2223 BEFORE THE SUBCOMM. ON COURTS, CIVIL LIBERTIES AND ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS. (1975), pp. 332, 338, 2077

COPYRIGHT LAW REVISION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS

FIRST SESSION
ON
H.R. 2223

COPYRIGHT LAW REVISION

MAY 7, 8, 14, 15; JUNE 3, 5, 11, 12; JULY 10, 17, 23;
SEPTEMBER 11, 18; OCTOBER 9, 30;
NOVEMBER 6, 20; AND DECEMBER 4, 1975

Serial No. 36
Part 1

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U.S. GOVERNMENT PRINTING OFFICE

* * *

Hearings on H.R. 2223

WASHINGTON : 1976

* * *

[332] . . . of the material available for our students and teachers. We are particularly pleased to note that the principal professional organization of media educators, the Association for Educational Communication and Technology, is also supporting the language of 107, as it now stands.

For our part, we recognize the industry's responsibility to help educators utilize new technology as effectively as possible to improve the instructional process. We have made studies and developed a series of licensing arrangements over the past 2 years in cooperation with individual school systems. These accommodations allow schools for the first time to duplicate copies of purchased materials under agreed-upon formulas of compensation and provide access to needed materials.

We also have made a very strong and successful effort to establish and maintain dialogs with the users of educational media. This has taken several forms, with dozens of discussions with users of these materials, approximately a dozen articles in educational journals, reprints which have been made available free to educators, and individual efforts of members of our copyright committee to assist school systems to adopt viable copyright policies.

We are always ready to discuss with educational organizations guidelines to aid in determining parameters of fair use. The bill, as introduced, is good and workable, in

our opinion, the product of many days of deliberation by the respective congressional committees and concerned parties. It is universally recognized that revision of the 1909 statute is imperative. The sooner this is accomplished, the better it will be for all concerned.

We appreciate this opportunity to appear before you.

I would like to close by summarizing our small industry. The gross dollar revenue per member company is small. Our unit sales are small. Anything that would take away from these sales would, in fact, hurt our industry and member companies. We do not want to stop technology. We want to accommodate technology and educators. We feel we have gone as far as we can go. That is why we support H.R. 2223 particularly section 107 as it stands.

MR. KASTENMEIER. Thank you, Mr. Meell. We will now hear from Mr. Zurkowski.

[The prepared statements of Paul Zurkowski follow:]

STATEMENT OF PAUL G. ZURKOWSKI, PRESIDENT, INFORMATION INDUSTRY ASSOCIATION

Mr. Chairman. I am Paul G. Zurkowski, President of the Information Industry Association, 4720 Montgomery Lane, Bethesda, Md. 20014. As you know, the information industry has grown up in the years since 1967. The Association was formed in 1968. As an attorney with some publishing experience, I have served since February 1969 as its first principal paid employee. Prior to that time, of

course, I served as legislative assistant in your office for approximately five years.

The Association presented testimony to the Senate Committee on these same issues in 1973. I refer you to that testimony for a detailed explanation of the industry. It begins at p. 266 in the July 31. Aug. 1, 1973 Hearings on S.1361.

In her testimony last week the Register of Copyrights expressed grave concern about information technologies. She said that because of today's technology once an author's idea is "out of the cage", he has no way to recapture it. He cannot receive compensation: he cannot control the context, in fact, he has lost his idea. She said that many authors are trying to determine if it is possible to let their ideas out preferring to keep them to themselves.

In the absence of effective copyright rules for modern information technologies it is possible to devise methods to limit distribution and to limit access to au- . . . .

* * *

[338] . . . have access to that systems version of the facts and another area would have access to another state-subsidized version. How would we as a nation sort out the truth without equal access to the same unabridged works of authorship. If the author's control over his work product through copyright is denied him by exemptions which free his works to be input, piecemeal or in total accurately or inaccurately, it is difficult to see how the nation can stimulate and reward authors for writing the insightful and critical commentaries essential to the functioning of a democracy.

An exemption of input from copyright infringement would have other effects as well:

By implication such an amendment to the present legislation acknowledges that to input copyrighted materials into a computer is an infringement under present law. A need for such a change in the law has not been proved.

The small printouts resulting from most computer searches would by their size alone be argued to constitute "fair use" of the information. Having inserted in the computer the Encyclopaedia Britannica, brief extracts would be printed out. Notwithstanding the fact that this is the only way to use encyclopedic information, many would seek to treat it as fair use. Since there is no provision for any payment system in the proposal, this apparently is the intended result.

If entire works are free to be input, such materials as the *Reader's Guide to Periodical Literature* could be keypunched and installed in a computer system. Such publications are used simply to find a specific article citation. Without specific provision for controlling uses, the protection offered by copyright would be minimal. Little would be published in the open literature and authors would attempt to protect themselves by limiting by contract what uses could be made of their works.

The stress on exemptions would have the effect of eliminating publishing media which did not have exemptions because the basis for creation and investment in dissemination efforts, a minimal proprietary position, would be eliminated. The result would be reduced creation and

distribution of works of authorship. The elimination of risk capital and the reliance on state capital would seriously retard development in many areas of science and the useful arts.

The proliferation of non-profit uses, particularly in information, today are legend. Government funding of research in information systems work, for example, is essentially limited to grants to non-profit organizations. This has led to the development of a whole generation of organizations performing this research on a non-profit basis. Separate non-profit groups have grown up to do similar research in education. We raise these questions not to challenge the purposes of these groups, but to suggest that the amendment is unduly broad as drafted and would serve, if enacted, to stimulate even further the development of subsidy-based information dissemination activities.

Finally, we believe there are several basic legislative drafting objections to the exemption proposal:

The amendment conflicts with the purpose of Section 117 to maintain the status quo in the law vis-a-vis copyright at input. If the committee is to consider seriously this exemption, similar serious consideration must be given to the author's rights-based amendments offered above. It should be clear from a brief reading of the amendments we have suggested that this is an exceedingly complex area and that it cannot be dealt with simplistically.

The amendment, if coupled with the library photocopying exemption appears to destroy the economic base of publishing. What the education exemption would allow to be input

without infringing copyright, the library exemption would permit the copying of. The result would be the elimination of meaningful copyright protection for authors.

The amendment would preempt much of the work of the National Commission on New Technological Uses of Copyrighted Works. By granting such an exemption the amendment would not only prejudge a large segment of the Commission's responsibilities, but it would also create a situation where there would be no experience for the Commission to draw on in evaluating how authors and users can resolve problems and develop workable relations within an economic framework.

In summary, the information industry position on H.R. 2223 is that subject to some technical amendments the bill should be enacted in its present form and that the library and education exemptions should be rejected. In the event that serious consideration is given to any such amendments, of a nature to deprive authors of significant rights in the new information technologies we respectfully . . . .

* * *

[2077] Congress provided for the creation of a body to study and make recommendations concerning computer uses of copyrighted works by enacting Public Law 93-573. This created in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works. Among other functions, the Commission is "to study and compile data on the reproduction and use of copyrighted works of authorship in conjunction with automatic systems capable

of storing, processing, retrieving and transferring information . . ." It also provides that "[t]he Commission shall make recommendations as to such changes in copyright law or procedures that may be necessary to assure access to copyrighted works, and to provide recognition of the rights of copyright owners." The law provides that the Commission "shall submit to the President and the Congress a preliminary report on its activities" within one year of its first meeting. Within three years of the enactment of Public Law 93-573, the Commission is required to submit "a final report on its study and investigation which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations."

Analysis

Section 117 of the revision bill, in the words of Senate Judiciary Committee Report No. 983, "is intended neither to cut off any rights that may now exist nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable." [Page 154] However, as is further indicated in the Senate Report, section 117 is intended to preserve the status quo only with retard to those exclusive rights of a copyright owner enumerated in section 106 and qualified in sections 107 through 116.

Any action for infringement of a copyrighted work through its use in conjunction with a computer or similar information system would be a Federal action brought under the new title 17. If the question before the court required a decision on the scope of exclusive rights in the computer

area, the court "would first need to determine the applicable law, whether State common law or the Act of 1909." Once the court has determined what law is applicable, "its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute." [Senate Report No. 983 at 155.] This procedure is generally acceptable to both sides of the " 'input' as infringement" controversy because both believe that, under present law, their viewpoint would prevail.

CHAPTER 2

OWNERSHIP, TRANSFER, DIVISIBILITY, REVERSION

Summary

Chapter 2 of H.R. 2223 deals with ownership and transfer of rights. Some of the issues underlying this chapter were controversial at one time, but after compromises and redrafting there has been no debate over this chapter for several years.

The chapter begins with a reconfirmation that the fountainhead of copyright is the author, and that copyright ownership belongs to him in the first instance. As under the present law, an exception is made in the case of works made for hire. Provisions have been added clarifying the present law with respect to ownership of contributions to collective works and the divisibility of rights under a copyright.

A system of reversions, under which a disadvantageous transfer of rights can be terminated after 35 years by the

author or certain of his beneficiaries is substituted for the renewal system of the present law.

SECTION 201: OWNERSHIP

Collective works

Section 201(c) seeks to clarify one of the most difficult questions under the existing law: the ownership of contributions to periodicals and other collective works. It states explicitly that copyright in a contribution is separate from copyright in the collective work as a whole and that, in the absence of an express transfer, the owner of the collective work obtains only certain limited rights with respect to each contribution.

Divisibility

Subsection (d) of section 201 is even more far-reaching in its effects. In theory, under the present law, a copyright has been considered a single, indivisible bundle of exclusive rights. In practice this theory has been recognized . . . .

* * *

H.R. REP. NO. 1476, 94TH CONG., 2d SESS. (1976), pp. 47-55, 116, 122-123

HOUSE OF REPRESENTATIVES

94TH CONGRESS
2d Session

REPORT
No. 94-1476

* * *

COPYRIGHT LAW REVISION

SEPTEMBER 3, 1976. — Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT
together with
ADDITIONAL VIEWS

[To accompany S. 22]

The Committee on the Judiciary, to whom was referred the bill (S. 22) for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

H.R. Rep. No. 1476

Sec. 101. Title 17 of the United States Code, entitled "Copyrights" is hereby amended in its entirety to read as follows:

TITLE 17 — COPYRIGHTS

CHAPTER		Sec.
1.	Subject Matter and Score of Copyright	101
2.	Copyright Ownership and Transfer	201
3.	Duration of Copyright	301
4.	Copyright Notice, Deposit, and Registration	401
5.	Copyright Infringement and Remedies	501
6.	Manufacturing Requirement And Importation	601
7.	Copyright Office	701
8.	Copyright Royalty Commission	801

Chapter 1. — SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.

101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matter of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: Fair use.
108. Limitations on exclusive rights: Reproduction of works in archival collections.

109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
110. Limitations on exclusive rights: Exemption of certain performances find displays.
111. Limitations on exclusive rights: Secondary transmissions.
112. Limitations on exclusive rights: Ephemeral recordings.

* * *

PURPOSE

[47] The purpose of the proposed legislation, as amended, is to provide for a general revision of the United States Copyright Law, title 17 of the United States Code.

STATEMENT

The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, Art. I, sec. 8). Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their

development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Between 1924 and 1940 a number of copyright law revision measures were introduced. All these failed of enactment, partly because of controversy among private interests over differences between the Berne Convention and the U.S. law. After World War II, the United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955.

In that year, the movement for general revision of the U.S. copyright law was revived and the legislative appropriations act for the next 3 years provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for such revision. There followed a period of study which produced 35 published monographs on most, of the major substantive issues in copyright revision, and culminated in 1961 in the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law."

Between 1961 and 1964 there were numerous meetings and discussions under the auspices of the Copyright Office,

participated in by representatives of a wide range of interests affected by the copyright law. Gradually a draft bill for general revision took shape, and toward the end of the 88th Congress, on July 20, 1964, it was introduced in both Houses. The 1964 revision bill was introduced in the House of Representatives, as H.R. 11947, and in the Senate by request. as S. 3008.

No further legislative action was taken on the revision bill during the 88th Congress, but before the opening of the 89th Congress the [48] Copyright Office completely revised the bill in the light of the many comments that had been received. On February 4, 1965, the revised bill was introduced in both Houses: in the House as H.R. 4347, and in the Senate as S. 1006. The Copyright Office prepared a report to accompany the revised bill, and it was published in May, 1965 as "The Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill." Extensive hearings on the bill were he d in both Houses during 1965, and the Senate hearings continued in 1966. H.R. 4347 was reported by the House Judiciary Committee on October 12, 1966 (H.R. Rep. No. 2237, 89th Cong., 2d Sess.), but the 89th Congress adjourned before further action could be taken.

At the beginning of the 90th Congress the bill, in the form in which it had been reported by the House Judiciary Committee, was again introduced in both Houses: in the House of Representatives on January 17, 1967 as H.R. 2512, and in the Senate on January 23, 1967, as S. 597. H.R. 2512 was reported by the House Judiciary Committee, without further amendment but with dissenting views, on March 8,

1967 (H.R. Rept. No. 83, 90th Cong., 1st Sees.). The bill was passed by the House of Representatives, with several important amendments, on April 11, 1967, by a vote of 379 to 29. The Senate Judiciary Subcommittee conducted further hearings on S. 597 in March and April of 1967. However, it was not possible to complete action on copyright revision in the 90th Congress because of the emergence of certain major problems, notably that of cable television.

On January 22 (legislative day January 10), 1969, S. 543 was introduced in the 91st Congress. Title I of this bill, other than for technical amendments, was identical to S. 597 of the 90th Congress. Title II of the bill incorporated the provisions of S. 2216 providing for the establishment of a National Commission on New Technological Uses of Copyrighted Works. This title was a response to concerns as to the impact of the legislation on the use of copyrighted materials in computers and other forms of information storage and retrieval systems. The Senate had passed, on October 12, 1967, a bill establishing such a Commission for the study of this subject, but there had been no action by the House on this separate legislation.

On December 10, 1969, the Senate Judiciary Subcommittee favorably reported S. 543, with an amendment in the nature of a substitute. No further action was taken in the 91st Congress primarily because of the cable television issue.

On February 18, 1971, S. 644 was introduced in the 92nd Congress. Other than for minor amendments, the text of that bill was identical to the revision bill reported by the Subcommittee in the 91st Congress. No action was taken on

general revision legislation during the 92nd Congress, pending the formulation and adoption by the Federal Communications Commission of new cable television rules.

While action on the general revision bill was necessarily delayed, the unauthorized duplication of sound recordings became widespread. It was accordingly determined that the creation of a limited copyright in sound recordings should not await action on the general revision bill. S. 646 of the 92nd Congress was introduced to amend title 17 of the U.S. Code to provide for the creation of a limited copyright in sound recordings. This bill passed the Senate on April 29, [49] 1971, and, following hearings in June 1971, a companion bill (H.R. 6927) passed the House with amendments on October 4, 1971 and was enacted as Public Law 92-140.

On March 26, 1973 S. 1361, for the general revision of the copyright law, was introduced in the 93rd Congress. Other than for technical amendments, this bill was identical to S. 644 of the 92d Congress. Additional copyright revision hearings were held in the Senate on July 31 and August 1, 1973.

The Senate Judiciary Subcommittee on April 19, 1974 reported S. 1361 with an amendment in the nature of a substitute. After adopting several amendments to the subcommittee bill, the Senate Judiciary Committee reported the legislation on July 8, 1974. On July 9 the measure was removed from the Senate calendar and referred to the Committee on Commerce. The Commerce Committee reported S. 1361 with additional amendments on July 29. After adopting several amendments the Senate on September 9 passed S. 1361 by a vote of 70 to 1.

Since it was doubtful that adequate time remained in the 93d Congress for consideration in the House of Representatives of S. 1361, on September 9, Senator McClellan introduced and obtained immediate consideration of S. 3976. That bill, passed on September 9, extended the renewal term of expiring copyrights, established on a permanent basis a limited copyright in sound recordings, and created in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works. The House of Representatives passed the measure with amendments on December 19, 1974, and the Senate concurred in the House amendments on the same date. The President approved the bill on December 31, 1974, and it became Public Law 93-573.

At the beginning of the 94th Congress the revision bill, substantially identical to S. 1361 as passed by the Senate in 1974, was introduced in both Houses: Senator McClellan introduced S. 22 on January 15, 1975, and Chairman Robert W. Kastenmeier of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, introduced H.R. 2223 on January 28, 1975. S. 22 was reported, with additional views by the Senate Judiciary Committee on November 20 (legislative day, November 18), 1975, and passed the Senate unanimously, on February 19, 1976, by a vote of 97-0.

During 1975 the House Judiciary Subcommittee conducted extensive hearings on H.R. 2223, at which nearly 100 witnesses were heard. The Register of Copyrights also prepared a "Second Supplementary Report on General Revision of the U.S. Copyright Law," which discussed policy

and technical issues of the revision legislation. Following some 22 days of public mark-up sessions in 1976 the House Subcommittee favorably reported S. 22, by a unanimous vote, on August 3, 1976 with an amendment in the nature of a substitute. The Committee on the Judiciary now reports that bill, as amended, without change.

Title II of S. 22, as passed by the Senate, represents a piece of legislation separate from the bill for general legislation. This measure was originally introduced by Chairman Edwin Willis of the House Judiciary Subcommittee in 1957, and received active consid-[50]eration in both Houses during the early 1960's. It passed the Senate as separate legislation on three occasions, in 1962, 1963, and 1966. It was reintroduced in the 90th and 91st Congresses, and on December 10, 1969, the Senate Subcommittee conjoined it with the general copyright revision bill, reporting it as Title III of S. 543. As a separate title of S. 1361 of the 93d Congress, and now of S. 22, the design legislation has passed the Senate on two additional occasions.

In reporting S. 22, the House Judiciary Committee has deleted Title II. Until 1954, designs for useful articles were not generally subject to copyright protection. The primary protection available was the design patent, which requires that the design be not only "original", the standard applied in copyright law, but also "novel", meaning that it has never before existed anywhere.

However, in 1954 the Supreme Court decided the case of *Mazer* v. *Stein*, 347 U.S. 201, in which it held that works of art which are incorporated into the design of useful articles,

but which are capable of standing by themselves as art works separate from the useful article, are copyrightable. The example used in the *Mazer* case was an ornamental lamp base.

Title II of S. 22 as passed by the Senate would create a new limited form of copyright protection for "original" designs which are clearly a part of a useful article, regardless of whether such designs could stand by themselves, separate from the article itself. Thus designs of useful articles which do not meet the design patent standard of "novelty" would for the first time be protected.

S. 22 is a copyright revision bill. The Committee chose to delete Title II in part because the new form of design protection provided by Title II could not truly be considered copyright protection and therefore appropriately within the scope of copyright revision.

In addition, Title II left unanswered at least two fundamental issues which will require further study by the Congress. These are: first, what agency should administer this new design protection system and, second, should typeface designs be given the protections of the title?

Finally, the Committee will have to examine further the assertion of the Department of Justice, which testified in opposition to the Title, that Title II would create a new monopoly which has not been justified by a showing that its benefits will outweigh the disadvantage of removing such designs from free public use.

The issues raised by Title II have not been resolved by its deletion from the Copyright Revision Bill. Therefore, the Committee believes that it will be necessary to reconsider the question of design protection in new legislation during the 95th Congress. At that time more complete hearings on the subject may be held and, without the encumbrance of a general copyright revision bill, the issues raised in Title II of S. 22 may be resolved.

SECTIONAL ANALYSIS AND DISCUSSION

An analysis and discussion of the provisions of S. 22, as amended, follows:

SECTION 101. DEFINITIONS

The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

[51] SECTION 102. GENERAL SUBJECT MATTER OF COPYRIGHT

"Original works of authorship"

The two fundamental criteria of copyright protection — originality and fixation in tangible form — are restated in the first sentence of this cornerstone provision. The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include

requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

In using the phrase "original works of authorship," rather than "all the writings of an author" now in section 4 of the statute, the Committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase — "original works of authorship" — in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms — electronic music,

filmstrips, and computer programs, for example — could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, [52] designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the explicit recognition of all forms of choreography, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.

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Fixation in tangible form

As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be — whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

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The bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts — sports, news coverage, live performances of music, etc. — that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

Thus, assuming it is copyrightable — as a "motion picture" or "sound recording," for example — the content of a live transmission should [53] be accorded statutory protection if it is being recorded simultaneously with its transmission. On the other hand, the definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the "memory" of a computer.

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Under the first sentence of the definition of "fixed" in section 101, a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission.

Under this definition "copies" and "phonorecords" together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as an "original work of authorship." The two essential elements — original work and tangible object — must merge through fixation in order to produce subject matter copyrightable under the statute.

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Categories of copyrightable works

The second sentence of section 102 lists seven broad categories which the concept of "works" of "authorship" is said to "include." The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all classes of works now specified in section 5 of title 17; in addition, it specifically enumerates "pantomimes and choreographic works".

Of the seven items listed, four are defined in section 101. The three undefined categories — "musical works," "dramatic works," and "pantomimes and choreographic works" — have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that [54] "choreographic works" do not include social dance steps and simple routines.

The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works", and "sound recordings."

In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. The term "literary works" does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and work of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) as "prints or labels used for articles of merchandise." However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954), works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful

articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

The Committee has added language to the definition of "pictorial, graphic, and sculptural works" in an effort to make clearer the distinction between works of applied art protectable under the bill and industrial designs not subject to copyright protection. The declaration that "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned" is classic language: it is drawn from Copyright Office regulations promulgated in the 1940's and expressly endorsed by the Supreme Court in the *Mazer* case.

The second part of the amendment states that "the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." A "useful article" is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This part of the amendment is an adaptation of language added to the Copy-[55]right Office Regulations in the mid-1950's in an effort to implement the Supreme Court's decision in the *Mazer* case.

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In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statute or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design — that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

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A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely non-functional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.

The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces. A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters. The Committee does not regard the design of typeface, as thus defined, to be a copyrightable "pictorial, graphic, or sculptural work" within the meaning of this bill and the application of the dividing line in section 101.

Enactment of Public Law 92-140 in 1971 marked the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of . . .

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[116] SECTION 117. COMPUTER USES

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information." The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights specified for other types of uses in section 106 and qualified in sections 107 through 116 and 118. With respect to the copyrightability of computer programs, the ownership of copyrights in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

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Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State statutory or common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute.

* * *

[122] *Contributions to collective works*

Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collective works" would ordinarily include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act

plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 404 dealing with copyright notice, will preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing

the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contri-[123]bution itself or include it in a new anthology or an entirely different magazine or other collective work.

Transfer of ownership

The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance, alienation, or hypothecation," including assignments, mortgages, and exclusive licenses, but not including nonexclusive licenses. Representatives of motion picture producers have argued that foreclosures of copyright mortgages should not be left to varying State laws, and that the statute should establish a Federal foreclosure system. However, the benefits of such a

system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established.

Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he or she owns, is entitled "to all of the protection and remedies accorded to the copyright owner by this title." It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within, holding a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right.

Subsection (e) provides that when an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, have not previously been voluntarily transferred, no action by any governmental body or other

official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer. It is the intent of the subsection that the author be entitled, despite any purported expropriation or involuntary transfer, to continue exercising all rights under the United States statute, and that the governmental body or organization may not enforce or exercise any rights under this title in that situation.

* * * *

FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU) (1978), pp. viii, 12, 40

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS
(CONTU)

Tel: (202) 557-0996 Washington, D.C. 20558

July 31, 1978

President Jimmy Carter
The White House
Washington, D.C. 20500

Dear Mr. President:

It is my pleasure to transmit to you the final report of the National Commission on New Technological Uses of Copyrighted Works.

During its term of existence the Commission has sought to fulfill its statutory charter of making recommendations which recognize the legitimate interests of copyright proprietors in controlling the uses to which their works are put and in improving public access and availability to those works. I believe the conclusions contained in this report strike that balance.

For me and all of my fellow Commissioners, participation in the work of the Commission has been an exciting challenge. It has been a real and significant opportunity to

help make the Copyright Law effective in an overall national information policy dealing with present and coming advances in computer and reprographic technology.

Respectfully submitted,

Stanley H. Fuld
Chairman

* * *

CONTU Report

[12] . . . reached the opposite conclusion, and an Australian report considered computer issues outside its terms of reference.[45]

The Commission also believes that the effects of the recommendations pertaining to computer programs made in this report, as well as those pertaining to the other computer-related subjects within the Commission's jurisdiction, should be periodically reviewed. This could be accomplished on a smaller scale than that undertaken by the Commission but should be performed well and often enough to prevent the copyright law from becoming as anachronistic as did the 1909 Act.

The Commission is unanimous in its belief that computer programs are entitled to legal protection. But the unanimity has not extended to the precise form that protection should take.[46] The law as it exists today with respect to the protection of computer programs is not totally clear. What is clear is that today there are different and often conflicting methods used by proprietors to attempt to protect their products. These include patent and copyright — exclusively federal statutory methods; trade secret law — derived from statutory and judicial state law; and unfair competition — based on elements of common law and federal statute.[47]

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45. KEYES AND BRUNET, COPYRIGHT IN CANADA: Proposals for a Revision of the Law (1977); Report of the Copyright Law Committee on Reprographic Reproduction (1976).

46. See this chapter for the separate opinions of Commissioners Nimmer, Hersey, and Karpatkin.

47. See this chapter under Copyright and Other Methods Compared.

CONTU Report

To provide reasonable protection for proprietors without unduly burdening users of programs and the general public, the following statements concerning program copyright ought to be true:

1. Copyright should proscribe the unauthorized copying of these works.

2. Copyright should in no way inhibit the rightful use of these works.

3. Copyright should not block the development and dissemination of these works.

4. Copyright should not grant anyone more economic power than is necessary to achieve the incentive to create.

Relatively few changes in the Copyright Act of 1976 are required to attain these objectives, and the promulgation of regulations by the Copyright Office will ease the burden of compliance for both copyright owners and users.

Recommendations For Statutory Change

To make the law clear regarding both proprietors' and users' rights, the Commission suggests that the following changes to the Copyright Act of 1976 be made:

1. That section 117 as enacted be repealed.

2. That section 101 be amended to add the following definition:

CONTU Report

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

3. That a new section 117 be enacted as follows:

§ 117: Limitations on exclusive rights: computer programs

Notwithstanding the provisions of §106, it is not an infringement for the rightful possessor of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program *provided:*

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possessions of the computer program should cease to be rightful. Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

CONTU Report

The 1976 Act, without change, makes it clear that the placement of any copyrighted work into a computer is the preparation of a copy and, therefore, a potential infringement of copyright. Section 117, designed to subject . . . .

* * *

[40] Under normal circumstances, the transfer by sale or lease of a copyrighted work in computer-readable form, such as a data base, would be a meaningless transaction unless implicit in the transfer was the authorization to place or reproduce a copy in the memory unit of the transferee's computer. Any limitations on the use to be made of the copy would be a matter to be negotiated between private parties, guided by applicable public policy considerations.[167] The proprietor of a work in computer-readable form would, under any foreseeable circumstances, be able to control by contract the future disposition of machine-readable copies of his proprietary work. The proprietor of copyright in such a work would always have a valid cause of action, arising either under copyright or contract, if a reproduction of the work were entered into a computer without the proprietor's authorization, or if a transferee authorized a third party to enter a copy into the memory unit of a computer in violation

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167. Outright sale by a copyright proprietor of a copy of a protected work, rather than a lease under which the proprietor retains ownership of a copy which the lessee may use in accord with negotiated terms and conditions, normally results in a complete loss of control over the copy which has been sold. This reflects the unwillingness of courts to enforce restrictions on the alienation of property once a complete transfer of ownership interest in any item of property has been accomplished.

of the terms of a valid agreement with the proprietor. That copyright would not provide the sole right and remedy for unauthorized use of a protected work neither is unique to the protection of proprietary interests in computer-readable works nor is it a situation to be considered undesirable.[168]

Accordingly, the Commission believes that the application of principles already embodied in the language of the new copyright law achieves the desired substantive legal protection for copyrighted works which exist in machine-readable form. The introduction of a work into a computer memory would, consistent with the new law, be a reproduction of the work, one of the exclusive rights of the copyright proprietor. The unauthorized transfer of an existing machine-readable embodiment of a work could subject the violators to remedies for breach of contract. Principles of fair use would be applicable in limited instances to excuse an unauthorized input of a work into computer memory. Exemplifying such fair uses could be the creation of a copy

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168. Remedies for breach of contract, of the right being protected is not equivalent to copyright, would not be preempted under the provisions of section 301 of the new law, and would accordingly be available to one who, on the strength of a copyright interest, granted permission to another to make certain uses of the copyrighted work only to have the terms of the authorization violated. There continues to be some scope for state enforcement or proprietary rights in intellectual property under the new copyright law. See House Report, *supra* note 1. pp. 130-33. That state law rather than federal would be involved presents few real problems. The existence of parallel but not equal rights under state and federal law reflects advantages as well as disadvantages inherent in a federal policy, and generally both claims could be joined in the same federal cause of action under principles of pendent jurisdiction.

in a computer memory to prepare a concordance of a work or to perform a syntactical analysis of a work, which but for the use of a computer would require a prohibitive amount of human time and effort. To satisfy the criteria of fair use, any copies created for such research purposes should be destroyed upon completion of the research project for which they were created. Should the individual or institution carrying on this research desire to retain the copy for archival purposes or future use, it should be required to obtain permission to do so from the copyright proprietor.

* * * *

DEFINITION OF WORK MADE FOR HIRE IN THE COPYRIGHT ACT OF 1976: HEARING BEFORE THE COMM. ON THE JUDICIARY UNITED STATES SENATE, ON S. 2044, A BILL TO AMEND THE COPYRIGHT LAW REGARDING WORK FOR HIRE, 97TH CONG., 2d SESS. (1982), pp. 35, 45, 62-63, 69-70, 110-113

DEFINITION OF WORK MADE FOR HIRE IN THE COPYRIGHT ACT OF 1976

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS

SECOND SESSION
ON
S. 2044

A BILL TO AMEND THE COPYRIGHT LAW
REGARDING WORK FOR HIRE
OCTOBER 1, 1982

Serial No. J-97-146

Printed for the use of the Committee on the Judiciary

* * *

U.S. GOVERNMENT PRINTING OFFICE

* * *

WASHINGTON : 1983

Hearing on S. 2044

[35] SUPPLEMENTAL TESTIMONY REGARDING WORK FOR HIRE UNDER THE COPYRIGHT ACT

PRESENTED BY
THE AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS
&
THE GRAPHIC ARTISTS GUILD

I. INTRODUCTION

The American Society of Magazine Photographers and the Graphic Artists Guild would like to thank the Judiciary Committee and Senator Mathias for the opportunity to address the problem of work for hire. Our Constitution provides that, "the Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." In practice, work for hire has been used to secure these exclusive rights for commissioning parties instead of the true free-lance creator. S. 2044, introduced by Senator Cochran, represents a valuable initiative in returning to the intent of our Founding Fathers.

A number of different abusive practices under work for hire were documented in our prior written submissions and the testimony given at the hearing itself on October 1, 1982. In this additional submission, we wish to deal mainly with what we believe would be a fair elaboration of S. 2044. Any bill must, of course, satisfy not only the needs of the creators, but also the needs of the purchasers of rights of usage.

Hearing on S. 2044

II. WHO BEARS THE RISK?

Before discussing remedies, we would like to examine more closely one of the publishers' central arguments — that they deserve to own the copyrights in commissioned works because such . . . .

* * *

[45] G. UNCONSCIONABLE TRANSFERS

This new statutory pattern would greatly aid creators while meeting the needs of copyright users. It should be pointed out, however, that even this proposal has some drawbacks for creators. The most noticeable is the fact that publishers can use work forever and pay only one fee — if certain conditions are met. For this reason, which stems from the general inability of the creator to negotiate on a value for value basis, we would suggest that the concept of unconscionability be added to the statute. Such a concept was present in Section 16 (Alternative B) with respect to unremunerative transfers in the 1964 Preliminary Draft. We would suggest that such a remedial concept be added as a new subdivision (f) for Section 201. It would read as follows: "(f) Unconscionable transfers. An author may, at any time following the transfer of a copyright or of any rights under it, bring suit to reform or terminate a transfer in which the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the authors or his successors. In such action the plaintiff shall have the burden of proving that, taking into consideration all factors including

the bargaining position of the parties, their respective contributions to the success of the work, and changes in business practices or media exploitation, the terms of the transfer have proved to be unfair or grossly disadvantageous to the author. The court shall decide the action in accordance with the principles of equity, and shall have discretion to reform or terminate the transfer on whatever terms it considers just and reasonable."

V. CONCLUSION

Our proposals would, we believe, permit out members and creators generally to bargain on what will more closely approximate a value for value basis. At the same time, these proposals will . . .

* * *

[62] Summary of the Statement of
E. Gabriel Perle on Behalf of
The Magazine Publishers Association
Before the Senate Committee on the Judiciary
On S. 2044

October 1, 1982

The Magazine Publishers Association is opposed to S. 2044.

— The provisions of the Copyright Act of 1976 regarding work made for hire were the product of years of study, consultation and debate. Those provisions carefully balance and reconcile the respective interests of the parties to work made for hire relationships.

— The present law provides ample safeguards which protect writers, photographers and artists who contribute to magazines from being dealt with unfairly.

— Nothing has occurred since the effectiveness of the Copyright Act of 1976 which justifies any change in the work made for hire provisions of that law.

— S. 2044 would constitute an unwarranted interference with the Literary marketplace and the right of parties to bargain freely within that marketplace.

— S. 2044 is an unnecessary effort to correct a non-existent problem.

[63] STATEMENT OF THE
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
Before The
SENATE COMMITTEE ON THE JUDICIARY
On
S. 2044

October 1, 1982

The Association of American Publishers, Inc. ("AAP") is pleased to accept the invitation of the Committee to express its views on S. 2044, as introduced by Senator Cochran on February 22, 1982. The AAP is the trade association of United States book publishers and (together with its predecessor organizations) represented the American book publishing industry during the long and delicate process of copyright law revision and implementation of the new Copyright Act.

Hearing on S. 2044

The AAP membership includes publishers of all types of books; of particular pertinence to the matter before you today, it includes principal publishers of our country's "instructional texts" and "collective works" (such as encyclopedias and dictionaries). From the AAP's point of view, the major impact of S. 2044 would be to remove these two types of books from eligibility for treatment, *with the individual author's* agreement*, as "works made for hire" under the 1976 Copyright Act. We emphasize the phrase "with the individual author's agreement" quite purposefully, for it appears to us that S. 2044 is based on a faulty premise.

* * *

[69] . . . planning and creation of the materials. During the preparatory stages, numerous individuals will participate under the publisher's supervision in assigned tasks relating to the submissions, review, revising, and reworking of manuscripts to meet detailed pedagogic and curriculum needs. Indeed, it will often be difficult to look at the final product and isolate a particular author's original contribution. And, after publication, similar processes of periodic, multiple-participant, revision will be necessary to continue meeting the needs of the teaching community.

Finally, considerations combining those just discussed for both encyclopedias and instructional texts apply to single textbooks comprised of commissioned chapters by particular specialists.

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* "Individual author," as used herein, includes artists, photographers, and others, as well as writers of text.

In these contexts, distinctions between staff employees and commissioned authors are, for purposes of the Copyright Act, illusory. In the absence of a single, identifiable copyright owner of the whole and its constituent parts, the processes of revision and updating would be severely inhibited, and the ability to adapt or license particular versions and uses (e.g., abridgements, special adaptations, foreign language editions, and — of increasing importance — microform, videoform, data base, and electronic media versions) would be significantly impaired. And subjecting discrete segments of larger interwoven units (whether paragraphs of particular entries or sections of the entire work) to myriad terminations of the publisher's rights would be virtually intolerable.

[70] These concerns are not parochial, limited to the financial fate of particular publishers. They are important elements of the publishing community's ability to meet the needs of the general, special, and educational publics for reference and instructional works: to create comprehensive, accurate, and up-to-date materials; to disseminate these materials in rapidly changing fashions that will adequately and effectively serve their purpose; and to maintain the economic incentive to continued creative effort that underlies our copyright laws.

D. "Abuses" Of Work Made For Hire?

Since the new Copyright Act came into effect in 1978, there have been occasional unsubstantiated rumblings of "Abuses" of the work made for hire provisions (a perjorative, by the way, that hardly pertains to the offering or negotiation of contracts or terms called for by legitimate business

considerations). However, we are aware of no circumstances under which the rights of individual authors are being deliberately or systematically abused or disregarded by our members. Additionally, and at the risk of repetition in part, we must point out that the revised Copyright Act already contains several safeguards for the author's interests in this connection:

- by requiring an "express agreement" that a commissioned work "be considered a work made for hire" as a condition to work made for hire treatment;

- by requiring that such an agreement be "written" and "signed" by the parties;

* * *

[110] TESTIMONY OF AMERICAN BUSINESS PRESS

American Business Press (ABP) files this testimony in opposition to S. 2044 which would exclude periodicals from the "work for hire" provision of the Copyright Act where an article is solicited by a publisher from a writer who is not an employee of the publisher. We believe enactment of S. 2044 would represent an unwarranted reversal of longstanding judicial and legislative copyright policy — as it existed both before and after enactment of the Copyright Revision Act of 1976.

ABP is a publishers' association of over 500 specialized business, technical, scientific and professional journals circulated nationally and internationally. A list of the

members of ABP is attached. The information created and published by ABP publishers is vital to key decisionmakers in every segment of American technology, industry and business. Examples of ABP periodicals include *Aviation Week and Space Technology, Datamation, Defense Electronics, Iron Age, Laser Focus, Medical Economics, Public Utilities Fortnightly, Railway Age, Telephone Engineer and Management, and Word Processing and Information Systems.*

ABP periodicals employ full-time editors who are experts in the highly specialized fields covered by these publications. Frequently, they also commission outside experts to write articles of interest to readers in order to provide better editorial coverage. The expense of publishing these outside articles is borne by the publisher.

At the present time, the publisher is presumed to own the copyright in a commissioned article as long as there is an express written agreement between the publisher and the author to that effect.

Section 101 of the current Copyright Act defines a work for hire for commissioned work as follows:

> "a work specially ordered or commissioned *for use as a contribution to a collective work*, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instruc-[111]tional text, as a test, as answer material for a test, or as an atlas, *if the parties expressly agree in a written instrument*

> *signed by them that the work shall be considered a work for hire.*" [Emphasis supplied.]

The foregoing section of the 1976 Act gives authors *stronger* rights to ownership of a commissioned article than they had in the pre-1976 Copyright Act. The presumption existed in the pre-1976 Act that the publisher and the author *implicitly* agreed that the *publisher* had the copyright where the publisher commissioned an article from an author. *Brattleboro Publishing Co.* v. *Winmill Puhlishing Corp.*, 369 F.2d 565, 568 (2d Cir. 1966).

Section 101 of the 1976 Act also vests ownership of the copyright of a commissioned article in the publisher, but only if there is an express written agreement between the author and the publisher to that effect. *See May* v. *Morganelli-Henmann and Associates*, 618 F.2d 1363, 1368, n.4 (Ninth Circuit 1980).

Additionally, the work for hire doctrine for commissioned works was restricted by Congress in 1976 to certain categories: collective works (periodicals), films, translations, compilations and supplements, instructional texts, tests or atlases. Other kinds of commissioned work — e.g., musical compositions and books not falling within the foregoing categories were not included as works for hire.

The report of the Senate Judiciary Committee accompanying the 1976 Act explains that the final language of the 1976 definition of works for hire was a compromise, when it stated:

Hearing on S. 2044

Works made for hire.

Section 201 (b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The *work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures*. Their proposal was for the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of [112] his regular business, but the employee would retain all other rights as long as he refrained from authorizing competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. *The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange it for the uncertainties of the shop*

> *right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.*
>
> *The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process.* The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances. [Emphasis supplied.]

Under the 1976 Act, an author commissioned to write an article can veto the publisher's copyright by not signing a work for hire agreement. It is difficult to see what practical purpose[1] is served by S.2044 other than to upset a carefully crafted compromise.

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[1] The elimination of periodicals from the work for hire provision also would mean that after 35 years, copyright in a commissioned article would revert to the author, where the author originally assigned copyright to the publisher. Permitting authors to claim copyright after 35 years in an article originally commissioned by the publisher hardly seems worth disrupting the balance Congress wished to maintain between publishers and authors.

It is the *publisher* who conceives of the need for a work for hire article, pays for its physical production and for its delivery to the reader. Publication of the article provides recognition for the author among his professional peers and the public, a benefit not to be lightly dismissed. The work for hire doctrine promotes the dissemination of important scientific, business and technical information. As database publishing becomes more common, there should not be impediments to the publisher's flexibility to determine how articles can best be [113] distributed to the public. S. 2044 will only discourage the use of outside articles and will result in a smaller quantity of needed information at a time of rapid technological change.

We urge the subcommittee to recommend that S. 2044 not be enacted into law. It is piecemeal legislation which is unfair to publishers who provide an opportunity to writers for publication which otherwise might not exist. There is no reason to change the principle, long-embodied in copyright law, that the work of an independent contractor specially commissioned to contribute an article should be treated as an article written by a staff editor.

Both staff written articles and commissioned articles are created by the financial investment and creative inspiration of the publisher. Both are works for hire. The present statute should not be changed.

Hearing on S. 2044

Respectfully submitted,

s/ Robert A. Saltzstein
Robert A. Saltzstein

s/ Stephen M. Feldman
Wyatt and Saltzstein
1725 DeSales Street, N.W.
Suite 802
Washington, D.C. 20036
(202) 638-4485

Counsel for American Business Press

S. 2138, 98TH CONG., 1ST SESS. (1983)

S. 2138

98TH CONGRESS
1ST SESSION

To amend the copyright law regarding work for hire.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18 (legislative day, NOVEMBER 14), 1983

Mr. COCHRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the copyright law regarding work for hire.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 101 of title 17, United States Code, is amended—

(1) by amending clause (2) of the definition of "work made for hire" to read as follows:

"(2) a work specially ordered or commissioned for use as a part of a motion picture, as a translation, as a compilation, as a test, as answer material for a test, as an atlas, as a map, as a chart, as a table, as editorial

notes, as a musical arrangement, as a bibliography, or as an index, if the parties expressly agree in a written instrument limited to a single work and signed by them prior to the commencement of any work pursuant to such an order or commission that the work shall be considered a work made for hire.";

(2) by inserting after the definition of "anonymous work" and before the definition of "audiovisual works", the following new paragraph:

"An 'atlas' is a bound collection of maps.";

(3) by adding before the period in the second sentence of the definition of "compilation" the following:

", but does not include contributions to such collective works".

SEC. 2. Section 201 of title 17, United States Code, is amended—

(1) by inserting at the end of subsection (b) the following: "For purposes of this subsection, a party who fails to withhold the proper tax from wages pursuant to the requirements of sections 3102 and 3402 of the Internal Revenue Code of

1954 (26 U.S.C. 3102 and 3402), shall be presumed not to be an employer."; and

(2) by amending subsection (c) to read as follows:

"(c) CONTRIBUTIONS TO COLLECTIVE WORKS, CONTRIBUTIONS TO COMPILATIONS, SUPPLEMENTARY WORKS, INSTRUCTIONAL TEXTS, AND PARTS OF AUDIOVISUAL WORKS OTHER THAN MOTION PICTURES.—Copyright in each separate contribution to a collective work, in each separate contribution to a compilation, in any supplementary work, in any instructional text, and in any part of an audiovisual work other than a motion picture, is distinct from the copyright in the larger or revised work as a whole, and vests initially with the author who created the work which is to be incorporated into the larger or revised work. In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in such larger or revised work is presumed to have acquired only the privilege of reproducing and distributing the author's work as part of such particular larger or revised work, any revision of such larger or revised work, and any later larger or revised work in the same series. If an express transfer is made with respect to an author's work in one of these categories, such transfer shall be in a written instrument specifically enumerating each right being acquired and the consideration paid for that right and shall be signed by both parties. Such enumerated rights shall not exceed the rights

which the transferee reasonably anticipates exercising. In the event that any enumerated rights have not been exercised within two years after the first publication by the transferee or such transferee's successor in interest with respect to any right acquired, such unexercised rights shall be held by the transferee or such transferee's successor in interest as nonexclusive and the author shall not be restricted from and shall have the right to transfer such rights on a nonexclusive basis, provided that any party holding nonexclusive rights pursuant to this subsection shall be treated as holding exclusive rights for the purposes of section 501 with any judgment to be divided among the parties as the court in its discretion determines. A transfer by an author in one of the categories covered hereunder shall not be terminable by the author pursuant to section 203(a)(3) if a written contract signed by both parties prior to the commencement of the work specifically enumerates certain rights which may not be so terminated. For purposes of this subsection—

> "(1) an 'instructional text' means a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities; and
>
> "(2) a 'supplementary work' is a work prepared for publication as a

secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forwards, afterwords, pictorial illustrations, or appendixes. If a work is created under a work made for hire agreement pursuant to clause (2) of the definition of a work made for hire, it shall not be deemed a supplementary work for purposes of this section."; and

(3) by adding at the end of section 201 the following new subsection:

"(f) UNJUST ENRICHMENT.—With respect to those categories of works enumerated in subsection (c), an author may, at any time following the transfer of a copyright or of any rights under such copyright, bring an action to reform or terminate a transfer in which the profits received by the transferee or his successors in title are strikingly disproportionate to the compensation, consideration, or share received by the author or his successors. In such action the plaintiff shall have the burden of proving that, taking into consideration all factors including the bargaining position of the parties and their

respective contributions to the financial success of the work, the terms of the transfer have proven to be unfair or grossly disadvantageous to the author. The court shall decide the action in accordance with the principles of equity, and shall have discretion to reform or terminate the transfer on whatever terms it considers just and reasonable.".

SEC. 3. Section 202 of title 17, United States Code, is amended by striking out all after the semicolon in the second sentence and inserting in lieu thereof the following: "nor, in the absence of a written agreement expressly conveying property rights in a material object, does transfer of ownership of a copyright or of any exclusive rights under a copyright or the entering into of a work made for hire agreement pursuant to clause (2) of the work made for hire definition convey property rights in any material object.".

SEC. 4. Section 203(a) of title 17, United States Code, is amended by inserting in the first sentence after "work made for hire," the following: "or in the case of any transfer or license other than one which may not be terminated pursuant to the provisions of section 201(c)."

129 CONG. REC. 34,442 (1983)

CONGRESSIONAL RECORD—SENATE

34442 *November 18, 1983*

* * *

By Mr. COCHRAN:

S. 2138. A bill to amend the copyright law regarding work for hire: to the Committee on the Judiciary.

AMENDMENT OF THE COPYRIGHT LAW REGARDING WORK FOR HIRE

Mr. COCHRAN. Mr. President, today I am introducing legislation to amend the copyright laws to protect more effectively the work product of writers, artists, photographers, composers, and other such creators of works of art.

During the last Congress, I introduced S. 2044 after Bern Keating of Greenville, Miss., founder and past president of the Travel Journalists Guild, expressed to me the concern of his organization's membership about industry abuse of the work-for-hire laws. The bill proposed to exclude certain types of works from coverage of

34443 *November 18, 1983*

work-for-hire arrangements. Last fall Senator MATHIAS chaired a hearing of the Judiciary Committee to review S. 2044 and to examine industry practices. Representatives

of the Graphic Artists Guild, the Authors League of America, and the American Society of Journalists and Authors testified, as did representatives of the publishing industry.

Since that time, I have continued to work with Bern Keating, and members of the Graphic Artists Guild, to develop a better proposal for consideration by this Congress. Supporting the Graphic Artists Guild in its desire to reform the work-for-hire laws is a coalition of over 40 artist and writer groups representing more than 40,000 creators. I ask unanimous consent that the list be printed in the RECORD at the conclusion of my remarks.

Under present law, a work may be deemed a work made for hire if it is: First, a work prepared by an employee within the scope of his or her employment or, second, a certain type of work specially commissioned if the parties expressly agree in a written instrument signed by them that the work will be considered a work made for hire. Specially commissioned works are limited to those enumerated in the definition which includes contributions to collective works, motion pictures and audiovisuals, instructional texts, and others.

The significance of whether or not a work is a work made for hire is that when a work is made for hire, the creator is no longer the author for copyright purposes, but rather, the employer or the commissioning party is the author and receives all future income that may be derived from any use in any medium.

This presents less of a problem for employees who may lose authorship of their work but are deemed to be rewarded

by the terms of their employment provision of a salary and fringe benefits, a workplace, and tools and materials of their trade.

Freelance creators enjoy none of the security and benefits associated with employee status, are compensated only for the intended use of the copyrighted work, and are further cut-off from any other income generated by the subsequent use of their work. Because publishers enjoy a superior bargaining position, they are able to demand a work-for-hire contract as a condition of publication.

A striking example of the effect of work-for-hire on one graphic artist, Robin Brickman, was presented to the Judiciary Committee. Ms. Brickman testified that she was commissioned to do 27 black and white interior illustrations for the book, "Wildlife Stories of Faith McNulty," for $2,000. Although she tried to negotiate for a limited use contract and more money, she was told that she either sign the work-for-hire agreement or not get the job. She needed to work and signed the agreement. Later, the publisher chose one of her illustrations for the book jacket and added color. The cover was reprinted in the Washington Post and a nature magazine. Ms. Brickman received no additional compensation, nor was she consulted about the alteration of her work.

The theory of the work-for-hire doctrine is that the employer or commissioning party is entitled to authorship of the work because he conceives, directs, and controls the production of the work and bears the financial risks of development. While this argument is a strong one for works

prepared by an employee in the course of his employment, it holds little water for many freelancers who conceive and develop a work in their own studios. Yet artists, writers and others complain that work-for-hire contracts are forced even when the publisher exercises little or no control over the production of the work. And in many instances, work-for-hire agreements are demanded after a work has already been created—sometimes by use of a restrictive endorsement on a payment check, a practice clearly outside the intent of the work-for-hire laws.

Mr. President, the legislation I am introducing attempts to address these inequities. While work-for-hire agreements may be appropriate for minor works, charts, indexes and the like, our work for hire laws currently cover such works as magazine articles, photographs, illustrations, contributions to journals, newspapers, and anthologies, and numerous other types of works.

This legislation proposes to delete from the types of works which can be treated as works made for hire: first, a contribution to a collective work, second, an audiovisual other than a motion picture, third, a supplementary work, and fourth, an instructional text. These works would be subject to the copyright law's provision for a limited rights transfer. Parties would be free to contract any rights to be purchased, but my bill proposes that each right to be purchased be enumerated in the contract with the consideration to be paid for each right stated. Provision is made for the purchase of a non-terminable right, and rights acquired but not exercised within 2 years after the first publication would become nonexclusive. Such a structure

for contracting would insure that both parties are aware of what rights are being purchased and for what price. Additionally, rights unexercised by the publisher would become nonexclusive after 2 years from the first publication, enabling the creator to exercise them himself for additional revenue.

For those types of works for which work-for-hire agreements would continue to be available, my bill would require that the work-for-hire contract be entered into prior to the commencement of the work.

Additionally, provision is made for an unjust enrichment action by a creator when the consideration paid is strikingly disproportionate to the profits received. The plaintiff, however, would bear the burden of proof.

The bill also proposes to amend section 202 to require a written instrument to transfer ownership of the physical object, original art, from the creator to the publisher. Aside from the value of the copyright, a photograph, illustration, manuscript, or the like may be valuable in itself, and it represents another source of income for its creator.

Finally, the bill proposes to clarify the definition of employee by basing the determination of the employee-employer relationship on compliance with the withholding requirements of the Federal taxation laws.

Mr. President, there is considerable interest in the country that the Congress address the rights of artists and the inequities of work for hire. State legislatures and city

councils have begun to enact legislation on these very issues. State legislative enactments include work for hire, moral rights, and fair practices legislation. Moral rights legislation prohibits the alteration or mutilation of artwork and gives recognition to the artist's interest in his work after its sale. Fair practices legislation involves the transfer of ownership in the physical object, and, like my bill, requires a written instrument to effect such a transfer.

The New York and California State Legislatures have enacted moral rights and fair practices legislation. And the Oregon State Legislature has enacted a fair practices bill. Similar legislation has been introduced in Massachusetts and will be introduced in Alaska next year.

Additionally, the California State Legislature has enacted work-for-hire legislation that entitles a creator working under a work-for-hire agreement to employee benefits.

Finally, just this year the New York City Council passed a resolution calling on the U.S. Congress to take action on the issue of work for hire. Similar resolutions were passed by the Detroit and Providence, R.I. City Councils as well.

Mr. President, our copyright laws were enacted to promote and protect the creation of literary, artistic, musical, and other works. Yet our work-for-hire laws are depriving all artists, not only the new, young creators, of much of the income generated by their work, and, in many cases, are forcing them to abandon their careers. Society will be deprived inevitably of the richness that diversity of style and interpretation bring to literary and artistic expression unless Congress acts.

129 Cong. Rec. 34,442 (1983)

I urge my colleagues on the Judiciary Committee to continue their study of this very important issue and to schedule hearings on this legislation when Congress reconvenes next year.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

ORGANIZATIONS OPPOSING WORK FOR HIRE

Advertising Photographers Association.
American Federation of Television and Radio Artists.
American Society of Magazine Photographers.
Art Directors Club of New York.
Art Directors Club of Salt Lake City.
Artists Equity Association of New York.
Artists in Print.
Association of American Editorial Cartoonists.
Association of Medical Illustrators.
Association of Science Fiction Artists.
Boston Visual Artists Union.
Cartoonists Guild.
Comic Book Creators Guild.
Council of Writers Organizations.
American Society of Journalists and Authors.
Aviation/Space Writers Association.
Eastern Ski Writers.
Eastern Freelancers Association.
Garden Writers Association of America.
The I.B.W.
International Motor Press Association.
Media Alliance.
National Association of Science Writers.

129 Cong. Rec. 34,442 (1983)

National Book Critics Circle.
Outdoor Writers Association of America.
Science Fiction Writers of America.
Society of American Travel Writers.
Travel Journalists Guild.
Washington Independent Writers.
Foundation for the Community of Artists.
Graphic Artists Guild.
Association of Children's Book Artists and Authors.
Illustrators Discipline.
Graphic Designers Discipline.
Needleart Designers Discipline.
Textile Designers Discipline.
Independent Literary Agents Association.
Joint Ethics Committee.
National Artists Equity Association.
National Cartoonists Society.
National Writers Union.
PEN.
Screen Actors Guild.
Society of Authors Representatives.
Society of Illustrators of Los Angeles.
Society of Illustrators of New York.
Society of Illustrators of San Francisco.
Society of Photographers and Artists Representatives.

* * *

130 CONG. REC. 17,729 (1984)

CONGRESSIONAL RECORD — HOUSE

June 21, 1984 17729

* * *

By Mr. FRANK:

H.R. 5911. A bill to amend the copyright law regarding work for hire: to the Committee on the Judiciary.

* * * *

LEGISLATIVE HISTORY EXCERPTS, APPENDIX A TO BRIEF OF FOUR PLAINTIFFS-APPELLANTS JONATHAN TASINI, MARY KAY BLAKELY, MARGOT MIFFLIN AND DAVID S. WHITFORD, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 3, 1998

1961 DRAFT

As introduced in 1961 by Abraham L. Kaminstein, then the Register of Copyrights, the Copyright Office recommended that:

> [t]he statute should provide that copyright may be secured by the author or his representatives, successors, or assigns, except that —
>
> (a) In the case of a work made for hire (defined as a work created for an employer by an employee within the regular scope of his employment), the employer should have the right to secure copyright.
>
> (b) In the case of a periodical, encyclopedia, or other composite work containing the contributions of a number of authors, the publisher should have the right to secure copyright. The copyright secured by the publisher in the composite work as a whole should cover all of the contributions not separately copyrighted; but the publisher should be deemed to hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work and any other rights expressly assigned.

Register of Copyrights for the House Comm. on Judiciary, 87th Cong., 1st Sess., *Copyright Law Revision* 88 (Comm. Print 1961) (hereinafter "1961 Report").

1961 REPORT

The 1961 Report explains the recommended language, as follows:

> When the component parts of a composite work are created by the publisher's employees, the publisher acquires the rights in each part as employer. But when the component parts are contributed by independent authors, each author is the initial owner of his contribution, and the publisher must acquire his rights by assignment.
>
> * * *
>
> However, the author of a contribution may not have assigned all of his rights to the publisher. And in some cases there is no express agreement between then as to the assignment of rights. We propose that the rights not assigned should be held by the publisher in [2] trust for the author. And in the absence of any express agreement, only the right to publish the contribution in a composite work like that of the publisher should be deemed to have been assigned.

Id. at 87.

Legislative History Excerpts

1962 DEBATES

During a January 24, 1962 debate on that recommendation, Barbara Ringer, then the Assistant Register of Copyrights, explained that the report:

> recommends that the publisher should have the right to secure copyright in the work as a whole. Bear in mind, this is leaving aside the entire question of notice. This involves ownership only. With respect to the ownership of contributions to composite works, the report recommends that this very nebulous question be clarified, and that the publisher would be deemed . . .
>
> * * *
>
> to hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work, and any other rights expressly assigned.

Register of Copyrights for the House Comm. on Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision, Part 2* 144 (Comm. Print 1963).

Mrs. Harriet Pilpel (a representative of magazine authors and photographers) objected to the proposed language — "in the absence of any express agreement, only the right to publish a contribution in a composite work like that of the publisher should be deemed to have been assigned". She argued that all writers give "to a publisher [is] the right to

include his contribution in *that particular composite work*. There is no presumption that he gave [3] more than that. And, indeed, in my experiences, most authors do not give any more than that, except when the buyer says, 'We are buying all rights, or these rights'." *Id.* at 151. Under the language as phrased, she argued, the author would be deemed to have "assigned" all of his rights in the contribution to the publisher with only the first right to publish the contribution, thus, denying the author any rights to submit the contribution to other composite-work publishers. *Id.* at 152.

Mr. John Schulman, then the Chairman of the American Patent Law Association Committee on Copyright, recommended instead of all the "hard and fast rules" appearing in the 1961 Copyright Office's recommendations that presumptions be established:

> I think that if we thought in those terms, that certain presumptions are created from certain transactions but that they are nevertheless rebuttable presumptions, I think we'd find greater agreement on some of these protective provisions.

Id. at 152.

Mr. Irwin Karp, then a representative of the Authors League of America, agreed with both Mrs. Pilpel and Mr. Schulman:

> I think that it would simplify matters from the point of view of the author, the publisher, and anybody who is taking rights from the publisher,

> if the line of presumption were made clear. In other words, I see no objection to saying that, where a short story is published in a magazine, it should be presumed that the [4] publisher has acquired only the first serial right, or first magazine right, or whatever you call it — the right to publish in that edition — and that, in the absence of a specific assignment of other rights by the author in writing, recorded, no one would be free to presume that the publisher owned anything else, and would have to deal with the author.
>
> If the publisher wanted more, and the author were willing to give more, then they would do it by means of a specific assignment of other rights, which the publisher would then have available to record and to show to anybody who was going to deal with him with respect to these other rights. And I think the same should hold true in the case of a composite work.

Id. at 152-53.

Mr. Sydney A. Diamond, then of London Records, clarified:

> I would just like to note my general agreement with what Irwin Karp and Harriet Pilpel said about this, and to point out that I think the whole difficulty in this particular recommendation is the reference to a "similar composite work." Perhaps

> the basic intention really wasn't quite that, but was meant to apply to "that particular composite work." I think everyone would agree, then, that that was a desirable rule.

Id. at 153.

Mr. Horace S. Manges, then of the American Book Publishers Council, questioned what happens:

> if there is a revised edition of the composite work and some of the selections are omitted. Is that a composite work like that of the publisher, as referred to?

To which Irwin Karp responded:

> No, I would assume not. But you can protect yourself by adding to your voluminous contract another clause which says —
>
> > the publisher shall have the right to publish revised editions of this composite work, eliminating some of the contributions.

Id. at 153. The result of these debates was the 1963 "preliminary draft" by the Copyright Office of a revised Copyright Law.

[5] **1963 BILL**

Taking into account the debates quoted above, the 1963 preliminary draft of a revised Copyright Act defined the rights in contributions to collective works, then identified as Section 14(d), as follows:

> *Contributions to Collective Works*. Copyright in each separate contribution to a collective work — a work, such as a periodical issue of encyclopedia, combining the separate contributions of various authors into a collective whole — shall be distinct from copyright in the collective work as a whole, and shall vest initially in the author of the contribution. The owner of copyright in the collective work shall, in the absence of an express transfer of the copyright or of any exclusive rights under it, be presumed to have acquired only the privilege of publishing the contribution in that particular collective work.

Staff of House Comm. on Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision, Part 3* 15 (Comm. Print 1964).

1963 DEBATES

During June 11, 1963 debates on that draft, Abe A. Goldman, then the Copyright Office's General Counsel, reported:

> Section 14(d) deals with the special case of ownership of contributions to a collective work.

The first sentence states the principle that the copyright in a contribution is distinct from the copyright in the collective work as a whole, and that the usual principle that copyright ownership begins in the author (*see* § 14(a)) applies to the contribution. That is, the author of the contribution is initially the owner of the rights in the contribution.

The second sentence deals specifically with the question of ownership as between the author of the contribution and the copyright owner — normally the publisher — of the collective work as a whole, in the absence of an express agreement between them. In the [1961] Report it was recommended that, in this situation, the publisher of the collective work would be presumed to have the right to publish the contribution in his [6] particular collective work, and in any similar collective work.

In the course of our previous discussions of that question, strong arguments were made that there should not be a presumption of transfer of ownership, in the absence of any express transfer, of the right to publish the contribution in a similar collective work. We have adopted that argument, and the second sentence provides now that, in the absence of an express transfer of the copyright or an express transfer of any particular exclusive right under it, it would be presumed that the copyright owner of the collective work would

> have acquired only the privilege of publishing the contribution in his particular collective work. The only other right he [the publisher] would acquire would be any that were transferred to him expressly.

Id. at 257-58.

Mr. Alfred H. Wasserstrom, then a representative of the Magazine Publishers Association, argued that the current custom and practice in the magazine industry was for the publisher to register the copyright in the collective work and hold the copyright in trust for the author of a contribution. He complained that the wording of § 14(d) would change that custom. *Id.* at 259.

Copyright Office General Counsel Goldman responded: "would your concern be laid to rest, Mr. Wasserstrom, if . . . a provision that copyright stems from the author, but that the publisher of the periodical, by agreement with the author and by transfer from the author, could secure whatever rights they contract for in the transfer? Wasserstrom replied, "Well, I think it would go a long way toward clarifying my objection to the way subsection (d) is presently worded", but objected to the use of the word "express" in connection with transfers. *Id.* at 259-60.

[7] Mrs. Bella L. Linden, representing the American Textbook Publishers Institute, then raised the same question about revisions that Mr. Manges had asked during the 1962 debate on the Copyright Act's 1961 proposal:

> The addition of the word "particular" [*i.e.*, *that particular collective work*] raises in my mind the question as to whether revisions of that collective work would be "that particular work" — whether a volume containing only half of the material in "that particular collective work" would therefore be excluded.

Id. at 261. Mrs. Linden received no response.

Instead, Authors League of America representative Irwin Karp responded to Mr. Wasserstrom, directly after Mrs. Linden's question about revisions:

> [a]s to Mr. Wasserstrom's comment on subsection (d), I think the draft as written reflects and clarifies what is sound practice in the publishing field. Actually, the publisher takes copyright in the individual contributions to collective works only because of a disinclination to put copyright notices on the bottom of the first page of each article or story [a remnant of § 403's harsh results that, if copyright notices are not placed on published copies of works, they devolve into the public domain]. Every reputable publisher that I know of willingly reassigns to the author, immediately after publication of the periodical, all rights except first periodical or first serial rights. And as Mr. Goldman has pointed out (and I heartily agree with him) this [rewording of § 14(d)] certainly makes it easier to carry that practice forward into the law. I really see no

> conflict between the position of the publisher and this section. They say the same thing, and this section would just make it a matter of record. It would avoid the necessity of assignments and carry out what is the agreement between most authors, publishers, and only an implied agreement. There are very few contracts between article- and story-writers and their publishers as to what's to happen. It is simply the [8] practice of the trade that, when the magazine has published, it reassigns all rights except first serial rights [to the author].

Id. at 261-262.

1964 BILL

Despite the lack of debate regarding, or in answer to, Mrs. Linden's question about whether "that particular collective work" included revisions, the 1964 draft of the copyright bill provided in Section 14(c), as follows:

> CONTRIBUTIONS TO COLLECTIVE WORKS. — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work and any revisions of it."

Legislative History Excerpts

Staff of House Comm. on Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision, Part 5* 9 (Comm. Print 1965) (hereinafter "1964 draft bill").

1964 DEBATES

During debates on the 1964 draft bill, on August 7, 1964, Magazine Publishers Association representative Wasserstrom repeated his objection to using the word "express" in connection with transfers by authors to publishers of contributions to collective works:

> This other point that I would like to address myself to is just a relatively minor one. If this second sentence [with the "express" retained] is to remain, it seems to me that there should be some clarification as to what is meant by [9] the phrase 'and any revisions to it' in connection with the reproducing and distributing of a contribution as part of a particular collective work. Treating it in the terms of this sentence, I'm not at all sure that the draftsmen intended to limit, in the absence of an express transfer, the publication on the part of the publisher to a particular issue of a particular periodical, thereby eliminating the relatively simple and generally accepted right of republication in the same periodical.

Id. at 149.

American Textbook Publishers Association representative Bella L. Linden's responded first by describing

her representation of publishers of encyclopedias, reference works and textbooks, which "in dollars-and-cents volume . . . represent 80% of the entire reference and technical field — in dollars, 800 million of a billion last year". *Id.* at 149. She then objected to the work-made-for hire section of the draft act. *Id.* at 150.

American Society of Magazine Photographers and Society of Magazine Writers representative Harriet F. Pilpel's then commented:

> There is obviously no provision of this proposed act of more importance to magazine writers and magazine photographers than section 14. Generally speaking, I think the Copyright Office has done an excellent job in setting forth what the law should be and, at the risk of disagreeing with Mr. Wasserstrom, also of what I think the law is. Mr. Wasserstrom referred to the law and settled practice today in terms of the ownership of all rights in a contribution to a collective work being acquired by the owner of the collective work. . . .
>
> I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c): ". . . and any revisions of it." If that means 'any revisions of the collective work' in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or

> at least an ambiguity, that somehow the [10] owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed or eliminated to make that absolutely clear.
>
> As far as collective works are concerned, it seems to me that Mr. Karp is quite right in the statements which he made on behalf of authors. In particular, I should like to point out that, where lump sums are paid, there is a tendency to regard the transaction as an employment for hire although it may not be. It is in that situation particularly that greater definition and clarification are called for, and it is in that situation particularly that reversion is called for, because there is no continuing payment [to authors for continued uses by publishers].

Id. at 152-53.

1965 BILL AND COMMENTARY

The 1965 Revision Bill defined the "delicate balance between authors' and publishers' rights in collective works", as follows:

> CONTRIBUTIONS TO COLLECTIVE WORKS. Copyright in each separate contribution to a collective work is distinct from copyright in the

> collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or any rights under it, the owner of copyrights in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

Register of Copyrights for the House Comm. on Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision, Part 6* 68-69 (Comm. Print 1965) (hereinafter "1965 Revision Bill").

The explanation of what Section 201(c) means is as follows:

> [The first sentence] is intended to establish the significant principle that the copyright in a contribution and the copyright in the collective work in which [the contribution] appears are two different things, and that [11] the usual rule [in § 201(a)] with respect to initial ownership applies to the contribution. . . .
>
> Under the present law, the owner of the copyright in a collective work as a whole is also the owner of copyright in the elements of compilation and editing, in any contributions that were made for hire by [the collective work publisher's] employees, and in any contributions

in which all of the author's rights have been transferred to [the collective work publisher]. The bill would leave this situation undisturbed but, as recommended in the 1961 *Report*, would clarify and simplify the extremely confused and unsatisfactory situation now existing with respect to individual contributions that were not made for hire.

In conjunction with the notice provision in section 403, the second sentence of section 201(c) would preserve the author's copyright in his contribution without requiring a separate notice in his name or an unqualified transfer of all his rights to the publisher. It would also establish a presumption that, in the absence of an express transfer, the author [of the contribution] retains all rights except 'the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.' Under this presumption, for example, an encyclopedia publisher would be entitled to reprint an article in a revised edition of an encyclopedia, and a magazine publisher would be entitled to reprint a story in a later issue of the same periodical. However, the privileges under the presumption are not intended to permit revisions in the contribution itself or to allow inclusion of the contribution in anthologies or other entirely different collective works.

Id. at 68-69.

Legislative History Excerpts

1965 DEBATES

As with the prior drafts, commentary and debates ensued with regard to the 1965 draft bill. For example, the almost 2000-page report includes a letter from Prof. W. Albert Noyes, Jr., then Chairman, Ad Hoc Committee on Copyright Law Revision, in which he opined:

> [12] In our opinion, certain sections of the bill are particularly favorable for the individual scientific author. This is true of sections 201(c) and 204(a) relating to the ownership of copyright in collective works and to the requirement for a written transfer of copyright. We support these sections as we feel that the regularity and clarity of the procedures would more than offset their slight additional record keeping requirement.

Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 Before Subcommittee No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 1917 (1965).

1966 HOUSE REPORT

The 1966 Report of the Committee on the Judiciary to the House of Representatives on the copyright act bill No. 2237 stated, as follows:

> Under the language which has been retained, a publisher could reprint a contribution from one issue in a later issue of his magazine, or could reprint an article from a 1970 edition of an

> encyclopedia in a 1980 revision of it; he could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. No. 89-2237, at 116-17 (1966).

1976 HOUSE REPORT

Finally, in 1976, the House Report No. 94-1476 to the bill ultimately passed by Congress, stated:

> Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the [13] first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collective works" would ordinarily include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published

with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 404 dealing with copyright notice, will preserve the

author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a [14] fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint a contribution from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. No. 94-1476, at 122-23 (1976).